Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-525

ANTHONY D. PIRILLO, JR., ESQUIRE

AND

SALVATORE J. CUCINOTTA, ESQUIRE, *et al.*,

Appellants

v.

HONORABLE HARRY A. TAKIFF, *et al.*,

Appellees

JURISDICTIONAL STATEMENT

ON APPEAL FROM THE
PENNSYLVANIA SUPREME COURT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. ——

Anthony D. Pirillo, Jr., Esquire

And

Salvatore J. Cucinotta, Esquire, *et al.*

Appellants

v.

Honorable Harry A. Takiff, *et al.*

Appellees

On Appeal from the
Pennsylvania Supreme Court

JURISDICTIONAL STATEMENT

Appellants appeal from the decision of the Pennsylvania Supreme Court, entered on July 7, 1975, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented. In the alternative, the appellants request that their appeal be treated as a Petition for Writ of Certiorari.

OPINION BELOW

The opinion of the Pennsylvania Supreme Court in *Pirillo v. Takiff* is unreported in any official publication but a copy of the official slip opinion is attached hereto as Appendix "A".[1]

1. The case is now reported. *Pirillo v. Takiff*, — Pa. —, 341 A.2d 896 (1975).

JURISDICTION

Jurisdiction of this Court to hear this appeal is based on 28 U.S.C. §1257(2), which states:

> Final judgments or decrees rendered by the highest court of a State . . . may be reviewed as follows:
>
> * * *
>
> (2) By appeal, where [there] is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution . . . and the decision is in favor of its validity.
>
> * * *

In the case before the bar of the Court, the highest court of the Commonwealth of Pennsylvania, the Supreme Court of Pennsylvania, applied the American Bar Association (ABA) Code of Professional Responsibility to the appellants' constitutional rights as contained in the Sixth Amendment right to counsel of one's own choosing, the Fifth Amendment right to practice law, and the First Amendment rights of freedom of speech, assembly and petition.

In Pennsylvania, the ABA Code of Professional Responsibility was given statutory status by Pa. R.C.P. 205, 12 P.S. App. R.C.P. 205, and 17 P.S. §61, et seq., Act 1937, June 21, P.L. 1982; *Pirillo v. Takiff*, Appendix "A" at page 27.

The validity of the ABA Code of Professional Responsibility is drawn into question as applied to the appellants on the grounds of being repugnant to the United States Constitution, *i.e.* right to counsel, practice law, assemble, petition and free speech. *Cf. Marcus v. Search Warrant*, 367 U.S. 717; *Lathrop v. Donahue*, 367 U.S. 820.

The appellants also urge this Court to treat this appeal as a Petition for a Writ of Certiorari according to 28 U.S.C. §1257 (3); authority for such treatment being found in 28 U.S.C. §2103. *See National Association for the Advancement of Colored People v. Button*, 371 U.S. 415 (1963); *Brotherhood of Railway Trainmen v. Virginia*, 377 U.S. 1 (1964); *United Mine Workers v. Illinois State Bar Association*, 389 U.S. 217 (1967); and *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576 (1971), where this Court granted a Writ of Certiorari in very similar factual situations.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> . . . nor shall any person . . . be deprived of . . . property, without due process of law . . . .

The Sixth Amendment to the Constitution of the United States provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

The American Bar Association, Code of Professional Responsibility D.R. 5-105 (D) states:

> If a lawyer is required to decline employment or to withdraw from employment under D.R. 5-105, no partner or associate of his or his firm may accept or continue such employment.

The American Bar Association, Code of Professional Responsibility D.R. 5-105 (C) states:

In the situations covered by D.R. 5-105 (A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

The American Bar Association, Code of Professional Responsibility D.R. 5-107 states:

Avoiding Influence by Others Than the Client.

(A) Except with the consent of his client after full disclosure, a lawyer shall not:

(1) Accept compensation for his legal services from one other than his client.

(2) Accept from one other than his client any thing of value related to his representation of or his employment by his client.

(B) A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services.

QUESTION PRESENTED

Where members of the Fraternal Order of Police (F.O.P.) appear with counsel of their choice before a grand jury, do their collective rights of counsel, the F.O.P.'s rights of assembly, free speech and petition, and the attorney's right to practice law, restrict the Government from dismissing the attorney chosen by the members through the guise of regulating professional misconduct in order to facilitate the discovery of possible criminal activity of said members?

(Answered in the negative by the court below).

STATEMENT OF THE CASE

The appellants consist of two licensed Philadelphia lawyers, Anthony D. Pirillo, Jr., Esquire, and Salvatore J. Cucinotta, Esquire, and twelve policemen. The twelve appellant-policemen[2] contribute to a legal aid fund of the Fraternal Order of Police, Lodge #5 (Hereinafter referred to as F.O.P.).

In June and July of 1974, the twelve policemen were subpoenaed before a special investigating grand jury. Each of them selected Anthony D. Pirillo, Jr., Esquire, as counsel of their choice and Salvatore J. Cucinotta, Esquire, by way of his association with Mr. Pirillo. The policemen were then separately interviewed by the attorney-appellants to determine whether any of them, as they were interviewed, had any conflict of interest with policemen already interviewed (Record, as certified to this Court by the Prothonotary of the Pennsylvania Supreme Court, pages 111, 115, 116, 119, 131, 133, and 135. Copies are contained in Appendix "B", pp. 45 to 50).

On July 3, 1974, the special prosecutor, Respondent Phillips, who is in charge of investigating police corruption, advised the supervising judge that a possibility of a conflict existed and asked the supervising judge, Respondent Takiff, to dismiss the attorney-appellants from representing the twelve policemen. In support of the request for dismissal, the special prosecutor advised the judge *in camera* without the attorneys for the policemen present, why a possibility of a conflict existed (See Appendix "A" at p. 28). Counsel for the policemen objected to the prosecutor's attempt to dismiss them without a due process evidentiary hearing being held by an impartial jurist (Appendix "B" at p. 47) where the moving party, the prosecutor,

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2. The twelve police appellants are: Michael Petta, Alfred C. Pfeiffer, William Deabler, Edward Milewski, Ronald Kluge, John Beal, Carmen Giordano, Harry Quigley, Leroy Ward, James Malaby, Joseph Corvi and George Elwell.

could sustain his position via competent evidence (Appendix "B" at page 46).

Despite timely objection, the appellants at said hearing had the burden of going forward to demonstrate that no conflict existed. At the hearing, the appellants all indicated that counsel of their choice was Anthony D. Pirillo, Jr., Esquire, and that as far as any one of the appellants knew that aside from their presumption of innocence, there was no probability of a possibility of a conflict. The policemen went one step further and *waived their rights to separate and conflict-free counsel.*

On July 7, 1975, the Pennsylvania Supreme Court rendered the decision of *Pirillo v. Takiff*, — Pa. —, 341 A.2d 896, 17 Cr. L. 2381. The Pennsylvania Supreme Court in *Pirillo* stated that the case involved

> The novel question of whether the supervising judge of a regular grand jury, conducting a special investigation, may disqualify a single attorney and his associate from representing twelve witnesses subpoenaed before the grand jury. (Appendix "A" at p. 26-7).

With regard to other policemen who are members of the F.O.P., the Court stated that: "[r]ecourse to F.O.P. lawyers in other legal matters are not restricted . . . save in this single proceeding." And that "[w]e do not mean to imply that multiple representation will never be tolerated at the grand jury." (Appendix "A" at p. 41).

After July 7, 1975, the twelve policemen involved in the case of *Pirillo* were advised by letter from the Special Prosecutor's Office that they could not be represented by counsel of their choice, nor by any counsel paid for by the F.O.P. The date for their appearance before the grand jury was set for July 16, 1975.

While your attorney-appellants were seeking a Stay in this Court[3], the special prosecutor enlarged the scope of

3. On July 16, 1975, your attorney-appellants filed a Petition for Stay Pending Appeal to the United States Supreme Court in the Court of Common Pleas. On July 16, 1975, Judge Blake denied this Petition for Stay along with an Application for Continuance (See Appendix "C" at pp. 55-7, Petition for Stay Pending Appeal to the United States Supreme Court). Petition for Stay was filed with the Pennsylvania Supreme Court and was denied on July 31, 1975. On August 1, 1975, an Application for Stay of Mandate of the Pennsylvania Supreme Court was filed with the United States Supreme Court. This Application, a copy of which is contained in Appendix "C" at p. 59 to p. 65, was denied on August 5, 1975, by Justice Brennan, and on August 13, 1975, by Chief Justice Burger. On August 13, 1975, your attorney-appellants filed a Motion for Reconsideration of Application for Stay of Mandate of the Pennsylvania Supreme Court Based on New Facts, with a request that the Application be directed to the Honorable William O. Douglas, a copy of said Application is attached at Appendix "C", pp. 51 and 53. On August 15, 1975, your attorney-appellants filed a Notice of Appeal to the Supreme Court of the United States in the case of *Pirillo*. On August 27, 1975, the certified transcript of record and docket fee were filed with the United States Supreme Court.

the *Pirillo* decision and began to send several letters to members of the F.O.P., who were not a party to the original *Pirillo* case.

For example, Officer Francis Martino, badge number 4013, was sent a letter dated July 28, 1975, regarding his scheduled appearance of August 5, 1975, before the grand jury. The special prosecutor rendering *his* legal advice to this witness stated:

> This letter is to inform you that with respect to the grand jury subpoena which has been served upon you, the Pennsylvania Supreme Court has ruled in the case of *Pirillo v. Takiff*, that you may not be represented before the grand jury by counsel *who is paid by the Fraternal Order of Police*. If you wish to be represented by counsel before the grand jury, you may retain your own attorney. If you cannot afford to hire an attorney, you should make application for the appointment of counsel to the Honorable Edward J. Blake, supervising judge of the grand jury. This application should be filed prior to your appearance on the date mentioned in the subpoena. (Emphasis supplied)

Officer Francis Martino came to your attorney-appellants. He wanted Mr. Pirillo to represent him. On August 5, 1975, your appellant, Mr. Cucinotta, appeared before the Honorable Judge Bullock as counsel for Officer Martino. Cucinotta immediately was dismissed without an evidentiary hearing on the question of conflict. Mr. Cucinotta then asked the judge for a Stay. This request was denied. Mr. Cucinotta was asked to leave the judge's chambers and was not allowed to attend the swearing-in of his client, nor was he allowed to be present when his client was advised of his rights and duties by the supervising judge. The judge then issued a written Order on August 5, 1975, whereby he directed Officer Martino to retain counsel other than your attorney-appellants. (A copy of said Order is attached and marked Appendix "D" at pp. 67-68). Officer Martino's appearance was continued to August 8, 1975.

On August 8, 1975, Mr. Cucinotta, appeared before Judge Bullock on behalf of another police client, Captain George Marthers. Captain Marthers' attorney of his choice were Messieurs Cucinotta and Pirillo throughout the summer of 1975. Mr. Marthers, via his counsel, challenged the validity of certain subpoenas directed to banking institutions via a Petition to Quash. Judge Bullock denied said Petition and dismissed Salvatore J. Cucinotta, Esquire, from representing Captain Marthers, without a hearing.[5] The Government acquired immediate possession of the bank records.

On August 18, 1975, Officer Anthony Mairone was subpoenaed to appear before the grand jury. Counsel of his choice was Mr. Pirillo. He was a recipient of an identical letter Officer Martino received. Mr. Cucinotta and Mr. Pirillo were present and ready to represent their client, Officer Mairone, because of their firm belief that the case of *Pirillo v. Takiff* applied only to the original twelve policemen. Despite your appellants' contention, Judge Bullock on August 18, 1975, decided that the attorney-appellants may not represent any police officers before the Special In-

5. See Appendix "E", pp. 69-71.

vestigating Grand Jury.[6] The dismissal of your attorney-appellants occurred despite the fact that no evidentiary hearing was held on the question of conflict.

The extension of the opinion in *Pirillo* to other police officers was further confused by the Government in the matter of Lieutenant Roy Stoner, badge number 358.

Lieutenant Roy Stoner received a subpoena on September 2, 1975, to appear before the special grand jury on September 3, 1975. He did not receive one of the form letters which Officers Marthers, Martino and others received, indicating that Mr. Pirillo and Mr. Cucinotta could not be selected as counsel.

On September 3, 1975, in Room 604, before the Honorable Judge Bullock in the presence of Assistant Attorneys General Harry Tischler and Nancy Moore, your appellant, Salvatore J. Cucinotta, appeared for the swearing-in of Lieutenant Stoner. Due to the variable application of the *Pirillo* case by the special prosecutor, appellant Cucinotta advised the Honorable Judge Bullock that he was present because Lieutenant Stoner had received no directive from the special prosecutor that he could not represent Mr. Stoner. The Government made no objection, and appellant Cucinotta acted as Lieutenant Stoner's legal counsel outside the grand jury room while Lieutenant Stoner testified.

Not only has the Government applied the *Pirillo* case to policemen who were not a party to the original case, but the Government now applies the case to the trial level.

On September 8, 1975, in 480 City Hall, before the Honorable Judge Biunno, the matter of *Commonwealth v. Hallman and Frame* was listed for trial. Hallman and Frame are former policemen. Counsel of their choice is Mr. Pirillo and Mr. Cucinotta. On the special prosecutor's own motion based upon *Pirillo v. Takiff*, the defendants were required to waive their rights to conflict-free counsel despite the fact that the special prosecutor never advised

6. A copy of the Order of August 18, 1975, is attached as Appendix "F", pp. 73-75.

the court the reasons why a probable conflict would develop at trial.[7]

7. A copy of the notes of testimony of said waiver are attached and marked Appendix "G", pp. 77-85.

THE QUESTION IS SUBSTANTIAL

The question presented in this case is substantial for three important reasons:

First, the decision in *Pirillo* when extended to all policemen violates their due process and equal protection rights;

Second, the question presented is substantial because the *Pirillo* decision is in conflict with the right of a citizen to waive his rights to conflict-free counsel as indicated in *Faretta v. California*, — U.S. —, 95 S.Ct. 2525, 45 L. Ed 2d 562; *U.S. v. Jeffers*, — F.2d —, 17 Cr. L. 2421 and *U.S. v. Garcia*, — F.2d —, 17 Cr. L. 2446;

Third, the *Pirillo* decision is in conflict with the right of an association to organize to obtain meaningful representation as voiced in *National Association for the Advancement of Colored People v. Button, supra; Brotherhood of Trainmen v. Virginia, supra; United Mine Workers v. Illinois State Bar Association, supra;* and *United Transportation Union v. State Bar of Michigan, supra.*

I. Extending the Mandate of *Pirillo* to all Policemen Without a Hearing on the Question of Conflict Violates Appellants' Due Process and Equal Protection Rights.

The Pennsylvania Supreme Court in deciding the case of *Pirillo* specifically limited the decision to the twelve policemen involved after a hearing was held (Appendix "A" at p. 41). The decision had no effect on the "F.O.P. efforts to initiate and defend legal matters or to provide legal services to its members save in this single proceeding." (Appendix "A" at p. 41). The Court further stated that Salvatore J. Cucinotta, appellant, was "Precluded from representing the twelve witnesses in this proceeding." *Ibid.*

This interpretation is further supported by the Court's valid concern that, "[t]he primary objectionable feature of state regulation in the First Amendment area is vagueness and overbreadth . . ." *Ibid* at p. 32-3.

Yet, the Government has extended the *Pirillo* decision to other policemen *without* holding an evidentiary hearing.

In the *Pirillo* case there was an *in camera* hearing and a subsequent evidentiary hearing where the witnesses and their attorneys were afforded the opportunity to demonstrate that *unknown facts supplied to the supervising judge were untrue*.

Appellants still maintain that the hearing granted is contrary to *United States v. Alberti*, 470 F.2d 878 (2nd Cir. 1972), *cert. den.* 411 U.S. 919, where the Court held in the aura of an independent judicial decision:

> . . . the district judge should conduct a hearing to determine whether there exists a conflict of interest with regard to defendant's counsel such that the defendant will be prevented from receiving advice and assistance sufficient to afford him the quality of representation guaranteed by the Sixth Amendment. In addition, the trial judge should see that the defendant is fully advised of the facts underlying the potential conflict and is given an opportunity to express his or her views. *United States v. Alberti*, 470 F.2d 878, 881-882 (2nd Cir. 1972), cert. denied, 411 U.S. 919.

See also, *United States v. Donatelli*, 484 F.2d 505 (1st Cir. 1973).

The hearing afforded in the *Pirillo* case, however, allows governmental selection of a citizen's attorney. The reason this exists is because there is absolutely nothing to restrain the prosecutor from supplying information to the supervising judge regarding a possible conflict. The Government may act on triple-hearsay information from unreliable sources that the possibility of a conflict may exist. This information could then be communicated to the judge who is in fact partisan since he is not an independent magistrate who could make a detached decision, but rather is the supervising judge of the special grand jury and as such, he is privy to the nature, scope and details of any investigation.

Thus, the supervising judge cannot make a detached decision regarding the possibility of a conflict. And yet he

is asked by the Government to find a possibility of a conflict at an *in camera* hearing to dismiss counsel of a witness' choice.

The subsequent hearing results in a sham because the policemen have no way of learning the triple-hearsay information supplied the basis of the original petition to dismiss.

As disagreeable as the evidentiary hearing is in *Pirillo*, however, one would expect that in extending the *Pirillo* mandate to other policemen, the prosecutor would follow the same procedure insofar as allowing for an *in camera* hearing followed by a public hearing. The fact is that the Government has not followed these procedural safeguards.

As indicated in the Statement of the Case, it is clear that the Government uses the *Pirillo* mandate only when they feel that defense counselling will thwart the grand jury's investigation. Without asking the Court, the special prosecutor sends letters to prospective witnesses where he indicates that your attorney-appellants cannot represent them. The injury to your appellants' professional practice and reputation is irreparable. Furthermore, note is taken that the Government has done away with supplying the supervising judge with *any* reasons for the dismissal of counsel. But, rather on their own motion, the Government decides whether a citizen may or may not be represented by counsel of that citizen's choice. The extension of the Court's mandate has resulted in the putrefaction of its holding. An attorney now must ask the Government whether he may be allowed to represent a particular defendant.

The Government takes the position, by their interpretive extension, that your attorney-appellants cannot represent a single policeman before the grand jury. Your appellants respectfully submit that the *Pirillo* mandate did not act as a proscription on the attorney-appellants from representing policemen for the rest of their lives.

The subsequent case involving Lieutenant Roy Stoner completely and flatly demonstrates that the Government

extends the *Pirillo* mandate in arbitrary and capricious fashion. Because even though the Government maintains that the *Pirillo* decision by itself dismisses your attorney-appellants from representing Captain Marthers and all policemen; with regard to Lieutenant Stoner an exception is made. The reason for this exception is unknown. But the exception logically shows that the *Pirillo* mandate applies only to a select few policemen and a select few attorneys.

Finally, for unknown reasons the prosecutor attempted to apply the mandate of *Pirillo v. Takiff* to a trial of co-defendants. Before the trial of Officers Hallman and Frame, the special prosecutor asked the trial court that in light of the *Pirillo* case the defendants should be warned on the record that since the attorney-appellants represented the F.O.P. and other policemen, that there may be a conflict of interest between representing them individually and representing the F.O.P. collectively. Furthermore, the special prosecutor asked the Court to warn defendants that since your attorney-appellants were paid by the F.O.P., that the attorney-appellants may have a conflict of interest. And finally, the special prosecutor asked the Court to advise the defendants that during the course of trial it may come to pass that a conflict of interest would develop between the defenses raised by each of them through their attorneys, who were associated with each other.

The Court then warned the defendants and asked them to waive their rights to any possible *unknown* conflicts that are present or may occur. Over objection, the defendants so waived. See Appendix "G".

By extending the mandate of *Pirillo v. Takiff*, the Government now can intimidate defendants who desire the same attorney.

An extension of the mandate in *Pirillo* to other proceedings: (1) Creates the real probability that the Government will select an attorney of their choice to represent a citizen; and, (2) completely violates the guarantees of equal protection and due process under the eyes of the law, in that evidentiary hearings on the question of conflict are not held.

Coming to grips with the position of the Government in criminal prosecutions highlights the pitfalls of governmental selection of a defense attorney. The purpose of the prosecutor is to enforce our criminal statutes, to prosecute and to convict. They do not perform the defense function. Consequently, the Government will select an attorney who assists the Government's duty to prosecute and convict. Indeed, that was the function of attorneys for the defendants in Star Chamber proceedings.[8]

II. The *Pirillo* Decision Is in Conflict with the Right of Citizens to Waive Their Rights to Conflict-Free Counsel as Indicated in *Faretta v. California*, — U.S. —, 95 S.Ct. 2525, 45 L.Ed. 2d 562 (June 30, 1975).

This Honorable Court ought to hear this appeal, not only because of the Government's misuse of the mandate of the lower Court's holding, but also because of this Court's decision in *Faretta, supra*.

In *Faretta*, this Court decided the question ". . . whether a State may constitutionally hail a person into its criminal courts and there force a lawyer upon him, even when he insists that he wants to conduct his own defense." 45 L.Ed.2d at 566.

When *Faretta* went on trial, the trial judge allowed him to represent himself, but later reversed himself and terminated his self-representation based on "the ends of justice." 45 L.Ed. 2d 568. In the *Pirillo* case, the basis for dismissing counsel was also the ends of justice insofar as the grand jury is involved in the "search for truth." (Appendix "A" at p. 34).

During the *Faretta* trial, the defendant asked that an attorney of his choice be appointed on three occasions. *Faretta, supra*, at n. 5. In *Pirillo v. Takiff*, all twelve policemen asked to have counsel of their choice without the court appointing same. Those requests were denied.

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8. History of Star Chamber as described in *Faretta v. California, infra*.

Speaking in terms of self-representation, this Court in *Faretta* states:

> An unwanted counsel represents the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not *his* defense. 45 L.Ed. 2d at 573-4.

Appellants submit that in the matter of *Pirillo v. Takiff*, the dismissal of counsel of the witnesses' choice and the command to select other counsel not paid for by the F.O.P. is "unwanted counsel" which denies the witnesses' constitutional right to assistance of counsel.

The only distinction between *Faretta* and the facts of *Pirillo* is that *Pirillo* involves potential defendants before a grand jury and *Faretta* involves a defendant at trial.

Is this a valid distinction?

No.

To hold otherwise would be to hold that a defendant has greater rights of counsel at trial than does a potential defendant before a grand jury. American criminal jurisprudence makes no such distinction. Furthermore, to find that in fact the defendant before the grand jury has less rights would open up dangerous possibilities. Since we have seen what the Government has done with the *Pirillo* case, by extension, it is not so improbable to expect governmental amendment of *Miranda* warnings now given to potential defendants before arrest. For example, must we amend the warning that one has the right to counsel of one's choice to merely a warning that one has a right to an attorney if the government decides there is no conflict of interest? Absolutely not! The alternatives in deciding that one has a lesser right to counsel at a grand jury demean and adulterate the cornerstones of democracy.

The *Faretta* opinion continues:

> In the long history of British criminal jurisprudence, there was only one tribunal that ever adopted a practice of forcing counsel upon an unwilling defendant in a criminal proceeding. The tribunal was the Star Chamber. That curious institution, which flourished in the late 16th and early 17th centuries, was of mixed executive and judicial character, and characteristically departed from common-law traditions. For those reasons, and because it specialized in trying 'political' offenses, the Star Chamber has for centuries symbolized disregard of basic individual rights. 45 L.Ed. 2d 574.

In the case of *Pirillo v. Takiff*, your appellants respectfully submit that the dismissal of your attorney-appellants as counsel for the original twelve in the *Pirillo* case and all other policemen, is to force counsel approved by the Government upon unwilling grand jury witnesses. This is a substantial problem that this Court should resolve.

The *Faretta* opinion also indicates that the question of counsel is inextricably intertwined with a citizen's First Amendment right of freedom of choice. 45 L.Ed. 2d at 581. In the *Pirillo* case, the dismissal of your attorney-appellants denies to them the freedom of choice the policemen involved maintain they are entitled.

Finally, the *Faretta* opinion addressed itself to the question of a knowing and intelligent waiver to which the Pennsylvania Supreme Court addressed itself in the *Pirillo* case. The *Pirillo* opinion at Appendix "A" indicates that even though the police witnesses attempted to waive the possibility of a conflict between them and the multiple representation of other policemen by the same attorney, "Such a waiver may very well be defective on the grounds that it is not a knowing and intelligent waiver . . . because full disclosure is impossible due to the requirements of grand jury secrecy." Appendix "A", page 35.

The *Faretta* opinion also addressed itself to a knowing and intelligent waiver. It does not require the defendant to go to law school to understand exactly what skills he waives.

> Although a defendant need not himself have the skill and experience of a lawyer in order completely and intelligently to choose a self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that "he knows what he is doing and his choice is made with eyes open." *Faretta* at 45 L.Ed. 2d 581-2.

The appellants submit that this language also ought to move this Honorable Court to hear this appeal.

The case of *Pirillo v. Takiff* also conflicts with the decision in *U.S.A. v. Jeffers*, — F.2d —, 17 Cr. L. 2421 (July 30, 1975).

In the *Jeffers* case, the Seventh Circuit Court of Appeals was faced with the reality of a lawyer at trial who refused to conduct a thorough examination of a prosecution witness because the prosecution witness was a former client of his firm. Both the prosecution witnesses and the defendants were related to a criminal organization called "The Family."

In the *Pirillo* case, the theoretical possibility of one police officer testifying against other policemen was considered. For example,

> If an attorney and his associate represent more than one of the officers who have been called to testify, where, as the special prosecutor alleges, each officer will be called to testify as to the activities of the other officers, an impermissible conflict purportedly exists. (Appendix "A" at p. 34).[9]

The *Jeffers* case holds that a waiver of conflict-free counsel by the defendants can take place. "We are persuaded, however, that the defendants waived their right to have [the prosecution witness] . . . subjected to further cross-examination." 17 Cr. L. 2422. And "By not asking any further questions, by making no offer of proof . . . [the defense attorney] on behalf of his clients, waived any additional cross-examination." *Ibid.* Appellants submit that the conflict referred to in the *Pirillo* case can also be waived.

9. At the original hearing before Judge Takiff (at Appendix "B" at p. 49 to p. 50) the record clearly demonstrates that each police officer was interviewed as to what the possible scope of the prosecutor's investigation may cover and whether they knew any criminal information regarding other policemen subpoenaed. All officers denied such knowledge. How could a conflict develop between innocent men?

The *Jeffers* case also states that the " . . . presumption is that the lawyer will subordinate his pecuniary interests and honor his primary professional responsibility to his clients in the matter at hand." 17 Cr. L. 2421.

In the hearing before Judge Takiff the record is clear that the attorneys' fee was paid on a per hour, per individual basis. Mr. Pirillo was not on retainer by the F.O.P. nor was the defense attorney in *Jeffers* on retainer from "The Family" or the prosecution witness. The Pennsylvania Supreme Court in *Pirillo* indicates (at pp. 36-7 of Appendix "A") that since Mr. Pirillo represented the F.O.P. collectively as a client several years ago, he somehow still has the best interests of the F.O.P. at heart when representing individual police officers in his later professional life. Appellants submit that this is contrary to the presumption of ethical conduct that Messrs. Pirillo and Cucinotta are entitled and indicates that the question should be heard by this Court.

Finally, the case of *U.S.A. v. Garcia*, — F.2d —, 17 Cr. L. 2446 (5th Cir., August 7, 1975) conflicts with the holding of *Pirillo*. *Garcia* involved several attorneys who represented policemen at trial. The attorneys involved represented other policemen who would be called as prosecution witnesses. Before trial, the Government filed a petition to dismiss counsel based on a conflict of interest.

In support of the petition, the prosecution was required to go forward with the evidence of a conflict and actually called two witnesses (Appendix "H", pp. 88-98). In the *Pirillo* case, the Government never had a burden of

proof to show there was a conflict and appropriate objection was made.

Returning to *Garcia*, the Court states:

> . . . we conclude that they [defendants] *can* waive such guarantees . . . The cases draw no distinction between waiver of the right to remain silent during interrogation, the right to confer with counsel, the right to representation by competent counsel at trial, the right to contest accusations of criminality through a plea of not guilty, the right to a jury trial, and the right to be present at trial. To do so would be to discriminate against one right in favor of another when the Constitution does not so require." (Appendix "H", pp. 93 and 94).

With regard to the facts presently before the Court, appellants submit that the policemen have the same right to counsel at trial as before the grand jury; that to make a distinction would be ". . . to discriminate against one right in favor of another. . ." *Ibid.*

Garcia also indicated that:

> [E]ven though the right to competent counsel is "fundamental", *Argersinger v. Hamlin*, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed. 2d 530 (1972); *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed. 2d 799 (1963); *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942); *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932), it may nonetheless be waived. *Ibid*

Continuing, the *Garcia* court states at 17 Cr. L. 2447:

> [T]he government's suggestion on appeal that it is impossible as a matter of law to waive the Sixth Amendment right to effective assistance of counsel in circumstances involving serious conflicts of interest is novel and unfounded. If defendants may dispense with the right to be represented by counsel altogether, *Faretta v. California*, — U.S. —, 95 S.Ct. 2525, 44 L.Ed. 2d — (1975); *McKenna v. Ellis*, 263 F.2d 35 (5th Cir. 1959), it would seem that they may waive the right to have their retained counsel free from conflicts of interest. Appendix "H" at p. 95.

Thus, the holding of *Pirillo v. Takiff, supra.*, conflicts with the position this Court, the Fifth Circuit, and the Seventh Circuit Court of Appeals has taken on similar issues. Faced with this dichotomy this Court should hear this instant appeal.

III. The Holding of *Pirillo v. Takiff* Directly Conflicts with the F.O.P.'s First Amendment Right to Collective Activity to Obtain Meaningful Representation.

The American Bar Association has stated:

> [T]he mere fact the lawyer is actually paid by some entity other than the client does not affect that relationship, so long as the lawyer is directly responsible to the client. A.B.A. Opinion 320 (1968).

Furthermore, this Court has treated the possibility of a conflict in several cases, all of which support the proposal that collective activity to obtain meaningful representation is a fundamental right within the protection of the First Amendment of the United States Constitution. *NAACP v. Button*, 371 U.S. 415, 835 S.Ct. 328, 9 L.Ed. 2d 405 (1963); *Brotherhood of R. Trainmen v. Virginia*, 377 U.S. 1, 12 L.Ed. 2d 89, 84 S.Ct. 1113, 11 A.L.R. 3d 1196 (1964); *United Mine Workers v. Illinois State Bar Association*, 389 U.S. 217, 88 S.Ct. 353, 19 L.Ed. 2d (1967); *United Transportation Union v. Michigan*, 401 U.S. 576, 91 S.Ct. 1076, 28 L.Ed. 339 (1971).

In the *NAACP* case, it is noted that, "A State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights . . ." of freedom of expression and association. 9 L.Ed. 2d 405, 421. See also *Schware v. Board of Bar Examiners*, 353 U.S. 232, 1 L.Ed. 2d 797, 77 S.Ct. 752, 64 A.L.R. 2d 288 (1957); *Konigsberg v. State Bar*, 353 U.S. 252, 1 L.Ed. 2d 810, 77 S.Ct. 722 (1957).

In the case before the bar of the Court, the Government performed what the Attorney General in the *NAACP* case attempted to do before censure by this Court. Through the guise of rectifying possible professional misconduct, the special prosecutor denies the appellants' freedom of association, speech and counsel.

The position espoused in the *NAACP* case is not to be construed narrowly. See e.g. *United Transportation Union v. Michigan, supra.*, 28 L. Ed. 339, 344.

In *Brotherhood of R. Trainmen v. Virginia, supra.*, the Virginia State Bar Association brought an action to dismiss counsel. The Bar Association wished to enjoin the Trainmen Association from recommending specific lawyers because it constitutes a solicitation of business. This Court states:

> *[I]n regulating the practice of law a State cannot ignore the rights of individuals secured by the Constitution.* (Emp. Supplied) 12 L.Ed. at 93.

The Government, by disqualifying counsel and forbidding client-appellants from securing counsel paid by the F.O.P. infringes upon the freedoms of speech, assembly and petition guaranteed by the First and Fourteenth Amendments. See, e.g. *New York Times Co. v. Sullivan*, 376 U.S. 254, 276-277, 84 S.Ct. 710, 11 L.Ed. 2d 686, 704; 95 A.L.R. 2d 1412 (1964), and cases therein.

In the *Trainmen* case, this Court also stated that:

> *A State could not, by invoking the power to regulate the professional conduct of attorneys, infringe in any way the right of individuals and the public to be fairly represented in lawsuits authorized by Congress to effectuate a basic public interest.* Laymen cannot be expected to know how to protect their rights when dealing with practical and carefully counseled adversaries, c.f. *Gideon v. Wainwright*, 372 U.S. 335, 9 L.Ed 2d 799, 83 S.Ct. 792, 93 ALR 2d 733 and for them to associate together to help one another to preserve and enforce rights granted them under Federal laws *cannot be condemned as a threat to legal ethics*, (c.f. Drinker, Legal Ethics (1953), 167; *Hildebrand v. State Bar*, 36 Cal 2d 504, 515, 225 P. 2d 508, 514 (Carter, J. dissenting), 36 Cal 2d at 521, 225 P. 2d at 518 (Traynor, J. dissenting). (Emp. Sup.) 12 L.Ed. 93-94.

The theory of the *NAACP* and *Trainmen* cases was again elaborated in *United Mine Workers v. Illinois State Bar Assoc., supra.*

> [T]he freedom of speech, assembly and petition guaranteed by the First and Fourteenth Amendments gives petitioner the right to hire attorneys on a salary basis to assist its members in the assertion of their legal rights. 19 L.Ed. 2d 426, 430.

Furthermore, this Court in the *United Mine Workers* case where the attorney was actually on salary held ". . . the dangers of . . . *conflicting interests between the association and individual litigants far too speculative to justify the broad remedy invoked by the State. . .*" (Emp. Sup.) 19 L.Ed. 2d 426, 431.

This Court in the *United Mine Workers* case also stated that:

> . . . in the *Trainmen* case there was a theoretical possibility that the union's interests would diverge from that of the individual litigant members, and there was a further possibility that if this divergence ever occurred, the union's power to cut off the attorney's referral business could induce the attorney to sacrifice the interests of his client. Again, we ruled that this very distant possibility of harm could not justify a complete prohibition of the Trainmen's efforts to aid one another . . . . (Emp. Sup.) 19 L.Ed. 2d 426, 431.

The First Amendment rights that the appellants maintain they possess were reaffirmed in *United Transportation Union v. Michigan, supra.* which states ". . . groups can unite to assert their legal rights as *effectively* and *economically* as practicable." (Emp. Sup.) 28 L.Ed. 2d 339, 344.

CONCLUSION

Appellants request that this Court accept this case. As indicated in the previous pages, the citizens of Pennsylvania are faced with a Prosecutor's office that is rendering their constitutional rights nugatory. The only light of relief rests in the hands of this Court.

Respectfully submitted,

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APPENDIX A

PIRILLO v. TAKIFF, SLIP OPINION

IN THE
SUPREME COURT OF PENNSYLVANIA
Eastern District

ANTHONY D. PIRILLO, JR., ESQUIRE, *et al.*	No. 184 Miscellaneous Docket No. 20
v.	Petition for Assumption of Plenary Jurisdiction, Writ of Prohibition and Supersedeas
HONORABLE HARRY A. TAKIFF	
ANTHONY D. PIRILLO, JR., ESQUIRE, *et al.*	No. 214 Miscellaneous Docket No. 20
v.	
HONORABLE HARRY A. TAKIFF and WALTER M. PHILLIPS, JR., ESQUIRE	Petition for Assumption of Plenary Jurisdiction, Writ of Prohibition and Supersedeas

OPINION

JONES, C.J. July 7, 1975

These two petitions[1] present the novel question of whether the supervising judge of a regular grand jury conducting a special investigation may disqualify a single attorney and his associate from representing twelve witnesses

1. In No. 184 Miscellaneous Docket No. 20, Attorney Pirillo and his associate Cucinotta joined with police officers Frame and Hallman to protest Supervising Judge Takiff's order which disqualified the two lawyers from jointly representing the two policemen before the investigating grand jury. The Commonwealth subsequently withdrew the subpoenas against the co-petitioners Hallman and Frame, thus rendering that matter moot. However, Judge Takiff subsequently ruled that petitioners Pirillo and Cucinotta were similarly disqualified from representing twelve other policemen who were subpoenaed to testify before the investigating grand jury. These twelve officers, Petta, Pfeiffer, Deabler, Milewski, Kluge, Deal, Giordano, Quigley, Ward, Malaby, Corvi and Ewell, joined the two attorneys in bringing No. 214 Miscellaneous Docket No. 20 in which Walter Phillips, the Special Prosecutor, became a named respondent along with Judge Takiff.

subpoenaed to testify before the grand jury. We decline to issue a writ of prohibition to the supervising judge who disqualified the two attorneys/petitioners.

On January 31, 1974, the Honorable Harry A. Takiff, respondent herein, charged the January 1974 Grand Jury as a special investigating grand jury to investigate, *inter alia*, corruption in the Philadelphia Police Department. On March 26, 1974, the Attorney General of Pennsylvania established the Office of the Special Prosecutor by appointing respondent Walter M. Phillips, Jr., as Deputy Attorney General to investigate and prosecute police corruption in Philadelphia. The convening of the grand jury and the appointment of the Special Prosecutor were actions taken in response to a Report by the Pennsylvania Crime Commission on Police Corruption and the Quality of Law Enforcement in Philadelphia.

In June and July of 1974, the twelve policemen/petitioners were subpoenaed to appear before the grand jury. Each officer was represented by petitioner Anthony D. Pirillo, Jr., Esquire and/or by Mr. Pirillo's associate, Salvatore J. Cucinotta, Esquire.[2] As was customary, before any

2. American Bar Association, Code of Professional Responsibility (adopted in this Commonwealth by Pa. R.C.P. 205) D.R. 5-105(D):

> "If a lawyer is required to decline employment or to withdraw from employment under D.R. 5-105, no partner or associate of his or his firm may accept or continue such employment."

witness testified, Judge Takiff held an *in camera* session with the Special Prosecutor or his representative during which the Judge was informed as to the proposed scope of inquiry for these witnesses. It was revealed by the Special Prosecutor that each witness would be questioned about the conduct of other police officers, and in most cases, about the conduct of each other. Most of the officers had been named in the Crime Commission Report as persons who had taken bribes from the owners of Philadelphia bars.

Because the Special Prosecutor's office brought to Judge Takiff's attention the possibility of a conflict of interest in the multiple representation by Attorney Pirillo and his associate of all the petitioners/witnesses, the supervising judge deferred the testimony of these witnesses pending a determination of the question. After an evidentiary hearing on the conflicts matter, the judge decided that Mr. Pirillo and his associate, Mr. Cucinotta, must be disqualified from representing all twelve of the policemen/witnesses before the grand jury. His decision was based on the following grounds:

(1) The multiple representation interfered with the individual witness's right to effective counsel. For example, if witness *A* has information about witness *B*'s criminal conduct, one attorney could not represent both. It may be in *A*'s best interest for counsel to advise A to cooperate. However, this would operate to the detriment of B.

(2) The attorneys' fee compensation arrangement with the Fraternal Order of Police, by whom the petitioners/attorneys were referred and paid, constituted a serious question of conflict because of the Fraternal Order of Police's avowed public policy of strenuous opposition to any form of cooperation by individual policemen with the Special Prosecutor's office and with the investigating grand jury. This would not only interfere with the public function of the investigating grand jury but would also jeopardize the rights of the individual witnesses to effective assistance of counsel because the attorneys might be compelled to pursue the dictates of the F.O.P. which pays them rather than the best interests of the witness.

(3) There would be a serious detriment to the investigative function of the grand jury because of the multiple representation. With one attorney representing all witnesses in a particular area of investigation, the Special Prosecutor could not convince counsel to elicit cooperation of one witness since such cooperation might seriously implicate the attorneys' other clients in illegal activity.

In summary, according to the Special Prosecutor, the practical effect of the multiple representation was the creation of the conspiratorial "stonewall" to the investigation shrouded by the interwoven attorney-client relationships.

On a Petition for Assumption of Plenary Jurisdiction,[3] for a Writ of Prohibition and for Supersedeas, we granted a rule to show cause why the Writ of Prohibition and Supersedeas should not be granted.

The extraordinary Writ of Prohibition is issued as a matter of discretion to prevent a lower court from acting outside its jurisdiction and to prevent it from abusing its discretion. *McNair's Petition*, 324 Pa. 48, 187 A.498 (1936). It is often used where the trial judge has acted in a blatantly unlawful manner. *Commonwealth ex rel. Spector v. Shiomos*, 457 Pa. 104, 32 A.2d 134 (1974); *Commonwealth v. Caplan*, 411 Pa. 563, 192 A.2d 894 (1963); *Schlesinger v. Musmanno*, 367 Pa. 476, 81 A.2d 316 (1951). There is the additional requirement, however, that there be an absence of other appellate remedies and the existence of extreme necessity before the writ will issue. *West Penn Power Company v. Goddard*, — Pa. —, — A.2d — (J-59 filed Mar. 18, 1975); *Carpentertown Coal & Coke Company v. Laird*, 360

3. The Petition for Assumption of Plenary Jurisdiction is superfluous to this controversy since the Supreme Court has original, though not exclusive, jurisdiction over all cases of prohibition to courts of inferior jurisdiction. Act of 1970, July 31, P.L. 673 No. 233 art. II §201(2), 17 P.S. §211.201(2) (Supp. 1974-75). The Rule to Show Cause was an assertion of our original jurisdiction.

Pa. 94, 61 A.2d 426 (1948). Accordingly, where an attorney's right to pursue his occupation by representing a particular defendant is curtailed by the lower court, we have held that a writ of prohibition is an appropriate remedy where the curtailment was unlawful, there being no adequate remedy for the attorney via appeal. *Moore v. Jamieson*, 451 Pa. 299, 306 A.2d 283 (1973). Since the right to counsel is inextricably linked to the right of an attorney to practice law, the two rights are properly reviewed together. *C.f., Moore v. Jamieson, supra*, 451 Pa. at 307, 306 A.2d at 287. If, as we conclude, the rights of the Petitioners were legitimately infringed upon, then the Writ of Prohibition will not issue.

I *Rights of the Petitioners*

In order to assess the legitimacy of the supervising judge's order, it is imperative that we assess the rights asserted and determine whether these rights may be balanced against competing state interests.

The twelve witnesses claim that the order of the supervising judge has impaired their right to counsel of their own choosing.

> "... [U]nder the Sixth Amendment to the United States Constitution made applicable to the States through the Fourteenth Amendment, 'the accused regardless of financial status is guaranteed the right to the assistance of counsel, *either counsel of his own choosing*, or if indigent or otherwise unable to secure counsel, counsel assigned by the court. *Gideon v. Wainwright* [372 U.S. 335 (1963)].' (Emphasis added.) *Commonwealth ex rel. Goodfellow v. Rundle*, 415 Pa. 528, 533, 204 A.2d 446, 448 (1964)." (Footnote omitted.)

Moore v. Jamieson, 451 Pa. 299, 307, 306 A.2d 283, 288 (1973).

In *Commonwealth v. McCloskey*, 443 Pa. 117, 277 A.2d 764 *cert. denied*, 404 U.S. 1000 (1971), a witness who was to

testify before the grand jury was granted the right to consult with counsel prior to and after his appearance, although the witness could not consult with counsel while in the jury room giving testimony. The witness could, however, refuse to answer a particular question and then come before the court with counsel to obtain a ruling as to whether the witness must answer the question. This precisely defined right to counsel before the grand jury struck a balance between society's interest in the orderly inquiry process of the grand jury and the individual's Fifth and Sixth Amendment rights. It is necessarily implicit that the witnesses who are petitioners here have a right to be represented before the investigating grand jury by counsel of their own choosing.

In the same vein, the petitioners who are attorneys contend that they have been denied the right to pursue the practice of law. Unquestionably, the right to pursue the occupation of one's own choosing may not be curtailed without due process of law. The interest in a profession, being akin to a property right, may not be removed arbitrarily. *Dent v. West Virginia*, 129 U.S. 114 (1889); *Moore v. Jamieson*, 451 Pa. at 308, 306 A.2d at 288.

But neither of these rights is absolute; both may be impaired or eliminated by state regulation which is designed to provide for overriding state interests or individual constitutional guarantees which are in conflict with these rights to counsel and to pursue one's profession. *United States ex rel. Carey v. Rundle*, 409 F.2d 1210 (3rd Cir. 1969); *Moore v. Jamieson*, 451 Pa. at 308-10, 306 A.2d at 288. *See Kremer v. Shoyer*, 453 Pa. 22, 37, 311 A.2d 600, 606 (1973) (Pomeroy, J., concurring).

In a third argument, the petitioners assert that the order of the supervising judge has infringed upon their freedom of speech, assembly and petition as guaranteed by the First and Fourteenth Amendments, citing *National Association for the Advancement of Colored People v. Button*, 371 U.S. 415 (1963), *Brotherhood of Railway Trainmen v. Virginia*, 377 U.S. 1 (1964), *United Mine*

Workers v. Illinois State Bar Association, 389 U.S. 217 (1967), and *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576 (1971).

One of the services the F.O.P. provides for its members is free representation by counsel when they are charged with a crime, questioned during a departmental investigation, or called as witnesses before an investigating grand jury. The attorney who represents the member is paid on a per hour basis by the F.O.P. The common thread running through the decisions in *Button, Trainmen, United Mine Workers* and *United Transportation Union* is that collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment. *United Transportation Union, supra*, at 585. However, all four of these cases acknowledged the fact that a state may constitutionally advance substantial regulatory interests to prevent specific harm from flowing from the particular petitioners' activities, which activities justify the infringement of First Amendment rights. *Button, supra*, at 444; *Trainmen, supra*, at 8; *United Mine Workers, supra*, at 222-24; *United Transportation Union, supra*, at 584.

Both *Button* and *United Mine Workers* specifically addressed the issue of potential conflicts inherent in the selection of lawyers by an organization to represent individual defendants. The selection procedures discussed there were similar to the method by which the F.O.P. recommends and pays qualified attorneys to represent individual members of the Order. The United States Supreme Court recognized that a state may act pursuant to its broad power to regulate the practice of law to prevent a serious conflict of interest from arising in the legal representation of its citizens, but held that the record below, in each instance, failed to demonstrate that any actual danger existed or that the state regulation was sufficiently narrow to meet only the particular form of danger present. The primary objectionable feature of state regulation in the First Amendment area is vagueness

and overbreadth which result in sweeping and improper application of a regulation. *Commonwealth v. Dell Publications, Inc.*, 427 Pa. 189, 233 A.2d 840 (1967); *Smith v. Crumlish*, 207 Pa. Superior Ct. 516, 218 A.2d 596 (1966). Thus, if regulations affecting First Amendment rights are no greater than necessary to eliminate the substantive evil and protect the substantial governmental interests and individual rights, then the regulation can be constitutionally tolerated. *McMullen v. Wohlgemuth*, 453 Pa. 147, 308 A.2d 888 (1973).

In summary, none of the three rights asserted by petitioners are absolute ones; they may be weighed against competing state interests.

II *State Interests*

The history and function of a grand jury charged with a special investigation is amply detailed elsewhere. *See, e.g., Commonwealth ex rel. Camelot Detective Agency Inc. v. Specter*, 451 Pa. 370, 373-74, 303 A.2d 203, 205 (1973); *Commonwealth v. McCloskey*, 443 Pa. 117, 131-37, 277 A.2d 764, 770-74 (1971); *McNair's Petition*, 324 Pa. 48, 56-62, 187 A. 498, — (1936); *Lloyd & Carpenter's Case*, 5 Pa. L.J. 55, 3 Clark 188 (Phila. Q.S. 1845). Suffice it to say that a grand jury charged with a special investigation seeks to discover past and continuing criminal acts which seriously affect or injure the public and with which normal law enforcement is unable to cope. *McNair's Petition*, 324 Pa. at 60-61, 187 A. at —. In order to perform its function adequately, the grand jury's scope of inquiry is necessarily broad. *United States v. Calandra*, 414 U.S. 338, 343 (1974).

A grand jury proceeding is not an adversary hearing in which the guilt or innocence of an accused is determined. Consequently, certain constitutional and supervisory protections have been held inapplicable to the grand jury proceeding in order to facilitate the jury's quest to determine whether a crime has been committed

and whether a prima facie case exists which warrants the institution of criminal proceedings. *United States v. Calandra, supra; United States v. Dionisio,* 410 U.S. 1 (1973); *Commonwealth v. McCloskey, supra.* The supervising judge sought by his order to protect the public function of the grand jury, *i.e.*, to insure that the grand jury's search for the truth in areas of alleged criminality affecting the peace and security of all persons and the Commonwealth would not be unduly impaired.

Secondly, the supervising judge cited the responsibility of the courts to protect the rights of each individual to effective counsel. There are two potential conflicts in this situation which could impair the sanctity of the attorney-client relationship. If an attorney and his associate represent more than one of the officers who have been called to testify, where, as the Special Prosecutor alleges, each officer will be called to testify as to the activity of the other officers, an impermissible conflict purportedly exists. The other potential for conflict arises from the attorney-client relationship between Pirillo and the Fraternal Order of Police, since the organization may have interests adverse to the best interests of the testifying officers.

The Sixth Amendment requires the services of a lawyer who is not obliged to serve conflicting interests. *Commonwealth ex rel. Gallagher v. Rundle,* 423 Pa. 356, 359, 223 A.2d 736, 737 (1966). *See Commonwealth v. Breaker,* 456 Pa. 341, 318 A.2d 354 (1974). We do not choose to place substantial reliance, as the supervising judge did, upon the rationale that the order below is justified because of the multiple representation of the witnesses by a single attorney, especially since our result can be sustained on other grounds. The witnesses argue that because they have chosen the particular attorney and his associate knowing full well that the attorneys represent all of the policemen subpoenaed and because the attorneys have, as fully as possible, advised the witnesses of the potentiality of the conflicts involved, therefore the

witnesses have waived their constitutional right to effective counsel. Such waiver may very well be defective on the ground that it is not a knowing and intelligent waiver; the client may not be fully and adequately informed as to the nature of the potential conflict, because, in this instance, full disclosure to the client, as required by the Code of Professional Responsibility, D.R. 5-105(c),[4] may be impossible in light of the requirements of secrecy surrounding the grand jury proceeding. But multiple representation, in and of itself, is not condemned. *Commonwealth v. Wilson,* 429 Pa. 458, 240 A.2d 498 (1968). In light of the strenuous assertions by the witnesses that they freely choose the multiple representation, we are not willing to base our result on the existence of multiple representation per se.[5]

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4. D.R. 5-105(c):

"In the situations covered by D.R. 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each."

5. There is another tangential consideration. The existence of multiple representation jeopardizes the time-honored concept of grand jury secrecy. Such secrecy is designed to protect the Commonwealth, the grand jurors, and the witnesses. Commonwealth, v. Kirk, 141 Pa. Superior Ct. 123, 14 A.2d 914 (1940) *aff'd.* 340 Pa. 346, 17 A.2d 195 (1941). *Cf.* Pa. R. Crim. P. 206-208; 18 Pa. C.S. §5103. If one of the witnesses reveals his testimony before the grand jury to his attorney, as he has every right to do, certainly the attorney will feel obliged, perhaps even subconsciously, to reveal to his other clients the testimony of the first witness. With the attorney in such a position, either the attorney-client relationship or the grand jury secrecy must suffer. Similarly, if, as will be shown, there is an attorney-client relationship between Attorney Pirillo and the F.O.P., then Pirillo might be compelled to advise the F.O.P. as to the testimony of the several petitioner/witnesses. These revelations could be inimical to the interests of not only the Commonwealth and the grand jurors, but also to the individual witnesses themselves, all of whom are intended beneficiaries of the traditional grand jury secrecy.

The other potential conflict which threatens the individual rights of the witnesses to the effective assistance of counsel stems from Pirillo's representation of the Fraternal Order of Police which is not formally a party to this action or in the grand jury proceeding. The F.O.P. pays the legal fees for its members who require representation before the grand jury. The Special Prosecutor claims that, based on the F.O.P.'s history of demonstrated enmity toward investigations into police corruption, the organization has adopted a tactic of noncooperation, which tactic is inimical to the rights of any witness who might stand to gain from a strategy of cooperation with the Special Prosecutor's office. It is further alleged that such a tactic coupled with the F.O.P.'s payment of fees on behalf of the witnesses could result in a complete frustration of the grand jury's function.

The danger in a situation in which an attorney looks to a third party for his fee was recognized by the ABA Code of Professional Responsibility, now given statutory status by Pa. R.C.P. 205.[6] Throughout the investigations into police corruption conducted by the Pennsylvania Crime Commission and the June, 1972, Special Investigating Grand Jury, the F.O.P. has consistently taken the position that these investigations were a threat to its members and made numerous efforts to thwart these investigations. For example, when the Crime Commission subpoenaed Police Commissioner Joseph O'Neill to testify, the F.O.P. sought to intervene and quash that subpoena on the ground that

6. D.R. 5-107 Avoiding Influence by Others Than the Client.

(A) Except with the consent of his client after full disclosure, a lawyer shall not:

(1) Accept compensation for his legal services from one other than his client.

(2) Accept from one other than his client any thing or value related to his representation of or his employment by his client.

(B) A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services.

the investigation would violate the rights of police officers. *See Pennsylvania Crime Commission Subpoena*, 453 Pa. 513, 309 A.2d 401 (1973). When the Crime Commission was about to issue its report, the F.O.P. sued to enjoin publication. *Fraternal Order of Police v. Packel*, 295 Commonwealth Court Docket (1974) (dismissed with prejudice on defendant's request, Jan. 6, 1975). In addition, the F.O.P. sought to quash supoenas issued by the June, 1972, Grand Jury. In each of these matters, the F.O.P. was represented by petitioner Pirillo. The F.O.P.'s attitude of broad noncooperation is apparently shared by respondent Pirillo, the attorney paid by the F.O.P. to represent its individual members. Thus, petitioner Pirillo testified that whenever a police officer indicated that he might consider cooperating, he would immediately remove himself as counsel and advise the witness to hire another attorney. This fee arrangement clearly has a chilling effect upon a police witness who is considering cooperation, since his access to F.O.P. paid counsel depends directly on his agreement not to cooperate. Moreover, the limited viability of the options open to a police witness suspected of illegal activity is further demonstrated by petitioner Pirillo's testimony that he would discuss the possibility of a witness cooperating only when the witness had come to him and raised the possibility. The failure of petitioner Pirillo to raise the subject of cooperation, apparently as a result of his fee arrangement with the F.O.P., deprives the witnesses of their right to the full and complete loyalty of their attorney.

The impropriety of a fee arrangement such as the one presented here and the manifest harm presented by such an arrangement both to the witnesses and to the efforts of the grand jury is discussed in *In re Abrams*, 56 N.J. 271, 266 A.2d 225 (1970), a case cited and discussed by Judge Takiff in his opinion. In *Abrams*, a disciplinary proceeding, an attorney who represented a numbers writer was paid by the numbers banker. The court said:

> "We . . . think it was improper for respondent to have accepted the organization's promise to pay his

bill, for such an arrangement has the inherent risk of dividing an attorney's loyalty between the defendant and the gambler-employer who will pay for the service. Obviously, it is in the interest of the defendant's employer that the defendant shall not turn him in. That is why the employer is willing to pay. . . . It is of course to the advantage of the convicted defendant to seek leniency by aiding the state. . . . It is the duty of the defendant's attorney to advise him of that opportunity. An attorney is hardly well situated to discharge that duty when he has agreed to look to the syndicate for the payment of his fee." 56 N.J. at 275-276, 266 A.2d at 278.

Accord, Salus's Case, 321 Pa. 106, 184 A.70 (1936).

The New Jersey Supreme Court went on to hold that the conflict of interest presented such a substantial danger both to the client and the public interest in the disclosure of crime that even the client's full knowledge and consent could not correct the impropriety of the attorney's action.

While the F.O.P. itself is not suspected of any criminal wrongdoing, it is an organization whose members are the subject of a grand jury investigation and which has taken the position that the interest of any single member in cooperating to obtain leniency must be sacrificed to the interest of the membership as a whole in obstructing any inquiry into police corruption.

We have recently stated:

"A trial judge, in the exercise of his inherent power to control litigation over which he is presiding and his duty to supervise the conduct of lawyers practicing before him so as to prevent gross impropriety, has the power to act where the facts warrant it. . . . Where the breach of ethics is made to appear, the relief is usually the granting of a motion to disqualify and remove the offending lawyer, and has been employed in this State as well as other jurisdictions. *Middleburg v. Middleburg*, 427 Pa. 114, 233 A.2d 889

(1967); *Seifert v. Dumatic Industries Inc.*, 413 Pa. 395, 197 A.2d 454 (1964)."

Slater v. Rimar Inc., — Pa. —, —, 338 A.2d 504, 539 (J-33 filed Apr. 18, 1975) (footnotes omitted). The test for determining whether there is an impairing conflict is probability, not certainty. *Middleburg*, 427 Pa. at 115, 233 A.2d at 890; *Seifert*, 413 Pa. at 398, 197 A.2d at 455. A court is not bound to sit back and wait for a probability to ripen into a certainty; it may restrain conduct which has the potential for evolving into a breach of ethics before such conduct becomes ripe for disciplinary action. *Slater v. Rimar Inc., supra; Cf. Kremer v. Shoyer, supra; Middleburg v. Middleburg, supra.*

III *Balancing of Competing Interests*

In balancing the conflicting rights of the state and the petitioners, four considerations dominate the weighing process:

"(1) Whether the state interest[s] sought to be achieved can be effectively accomplished in some manner which will not infringe upon interests protected by constitutional rights; (2) Whether the state interest[s] [are] sufficiently compelling when compared with the interests affected, [to justify] any infringement of those interests; (3) Whether the state interest[s] [are] sufficiently compelling to justify the degree of infringement that is necessary to effectuate that interest; (4) Whether the provision under challenge represents the narrowest possible infringement consistent with effectuating the state interest involved." *Moore v. Jamieson*, 451 Pa. 299, 310-11, 306 A.2d 283, 289 (1973).

None of the petitioners have suggested alternative means by which the interests of the state may be protected without the concomitant infringement upon the petitioners' individual rights. Nor are we able to conjure any plan other

than the one ordered by the supervising judge which would adequately protect the various state interests threatened by the multiple representation.

Furthermore, the interests of the state are sufficiently compelling to justify appropriately tailored infringements of constitutional rights. We have earlier pointed out that each right asserted by petitioners is susceptible to curtailment. We have also endeavored to demonstrate that the state interests are sufficiently strong to justify some incursion upon the rights invoked by petitioners. The court in its supervisory capacity over the grand jury must be alert to prevent as far as possible any abridgment of that body's function which is to investigate public wrongs and to bring indictments for the protection of society. The secrecy surrounding grand jury proceedings is a mechanism to insure the safety and reputation of witnesses and grand jurors. The historical and statutory power of courts to regulate the legal profession is one which is inherent in the power to oversee the administration of justice. Surely this power serves the interest of all citizens of the Commonwealth to be secure against the actions of attorneys subservient to clients with competing interests.

The degree of infringement in this instance is especially justified in light of the limited scope of the supervising judge's order, and the problems which are sought to be prevented. The pertinent part of the judge's order read as follows:

> "The Petition to Remove . . . Anthony D. Pirillo, Jr., Esquire, and his associate, Salvatore J. Cucinotta, Esquire, as counsel is GRANTED. The respective witnesses . . . are hereby ordered that if they wish private counsel they shall forthwith proceed to engage separate counsel for such purpose in accordance with the foregoing Opinion or, in the event their economic circumstances require it, to make timely application to the Court for a determination of eligibility and Court Appointment of Counsel."

The Opinion makes it clear that in no event may any witness hire an F.O.P.-related attorney. To hold otherwise would allow the witnesses to recreate albeit perhaps to a lesser degree the conflict sought to be eradicated. The order, however, pertains only to the conduct of the grand jury investigation. Recourse to F.O.P. lawyers in other legal matters is not restricted. There is no deterrence or chilling effect on the political expression of the F.O.P. and no smothering of discussion of common interests to its members or disruption of F.O.P. efforts to initiate and defend legal matters or to provide legal service to its members save in this single proceeding.

It is also manifest in the order of the supervising judge that no two of the subpoenaed witnesses who are parties to this petition may be represented by the same counsel. This portion of the order is essential to secure the secrecy of the grand jury proceeding. We do not mean to imply that multiple representation will never be tolerated at the grand jury level. Here, however, where each witness was a potential defendant, and the Court received information that the testimony of each officer might be expected to incriminate one or more of the other witnesses, and where the extent of the possible multiple cross-involvement in criminal activity is known to the Court but hidden from the individual witnesses by the requirements of secrecy, it is inappropriate for the supervising judge to permit multiple representation.

Attorneys Pirillo and Cucinotta are not suspended from the practice of law, formally disciplined, or precluded from representing the F.O.P. or any of its members in other litigation. They are, however, precluded from representing the twelve witnesses in this proceeding. Because of their relationship with the F.O.P., it would be improper to allow them to represent even one of the witnesses since the attorney-client relationship between the attorneys and the F.O.P. presents a serious danger that the attorney-client relationship with even one witness would be impaired.

In short, the degree of infringement resulting from the supervising judge's order is the minimum necessary to insure the state interests while at the same time the infringement is justified by the scope of the state interests and the extent of harm which is sought to be prevented.

The Petition for Assumption of Plenary Jurisdiction, Writ of Prohibition and Supersedeas at No. 184 Miscellaneous Docket No. 20 is denied as being moot.[7] In No. 214 Miscellaneous Docket No. 20, the Petition for Assumption of Plenary Jurisdiction, Writ of Prohibition and Supersedeas is denied.

Mr. Justice Nix did not participate in the consideration or decision of this case.

Mr. Justice Manderino filed a dissenting opinion.

7. See footnote 1, *supra*.

IN THE

SUPREME COURT OF PENNSYLVANIA

Eastern District

ANTHONY D. PIRILLO, JR. ESQUIRE, *et al.*	No. 184 Miscellaneous Docket No. 20
v.	
HONORABLE HARRY A. TAKIFF	Petition for Assumption of Plenary Jurisdiction, Writ of Prohibition and Supersedeas
ANTHONY D. PIRILLO, JR., ESQUIRE, *et al.*	No. 214 Miscellaneous Docket No. 20
v.	
HONORABLE HARRY A. TAKIFF AND WALTER M. PHILLIPS, JR., ESQUIRE	Petition for Assumption of Plenary Jurisdiction, Writ of Prohibition and Supersedeas

DISSENTING OPINION

MANDERINO, J. July 7, 1975

I dissent. The twelve witnesses in this case have knowingly, intelligently, and voluntarily chosen to be represented by the two attorneys who are the petitioners.

The majority's decision, denying the witnesses their choice of attorneys, is rooted in a presumption that the witnesses are guilty of crimes, even though there is not one shred of evidence in this record to warrant such a conclusion, and even though under state and federal law, the witnesses must be presumed innocent—not guilty. I cannot agree with the novel proposition that the *state* can deprive a citizen of his right to be represented by the attorney of his choice by speculating that he may be guilty.

APPENDIX B

EXCERPTS OF NOTES OF TESTIMONY OF HEARING
DECIDING CONFLICT QUESTION BEFORE JUDGE
TAKIFF, AUGUST 2, 1974

IN THE

COURT OF COMMON PLEAS

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

IN RE:

ANTHONY D. PIRILLO, JR. Evidentiary Hearing

Philadelphia, Pa., August 2, 1974

BEFORE: HONORABLE HARRY A. TAKIFF, J.

APPEARANCES:

ROBERT B. LAWLER, ESQ.,
MICHAEL LEVY, ESQ.,
Assistant Attorneys General.

ANTHONY D. PIRILLO, JR., ESQ.,
SALVATORE J. CUCINOTTA, ESQ.,
STANFORD SHMUKLER, ESQ.

* * *

BY MR. CUCINOTTA:

[7] . . . Further, your Honor, I think at this point, . . . I would believe that the burden would be the Commonwealth's to come forward with evidence to sustain their petition.

THE COURT: A prima facie case has been made out for possible conflict and disqualification. I so advised your associate, Mr. Cucinotta, and at this time I am calling on you to come forward with any evidence that you wish to bring to the attention of the Court.

MR. PIRILLO: We object to that, of course.

THE COURT: You have an exception.

* * *

[13] MR. CUCINOTTA: Initially, I would join in Mr. Pirillo's objection to the procedural aspects of this proceeding, and I object to the fact that we have the burden of proof.

THE COURT: I have indicated that the burden of going forward with the evidence is upon you at this time, Mr. Cucinotta. Your objection is noted and overruled.

* * *

[48] THE COURT: I assume that that conflict is as between the witness and other witnesses and not as between the witness and the Court.

MR. CUCINOTTA: No, your Honor. Of course not. That's correct.

THE COURT: The Court may be concerned with the latter phase of the matter because the Grand Jury proceeding is a proceeding in which the Grand Jury is an arm of the Court. You gentlemen understand that, of course?

MR. CUCINOTTA: You're saying that maybe you should not hear the case, your Honor, really.

THE COURT: Oh, no, I am not saying that at all. This is not that kind of a case. This is not an adversary proceeding in that context; it has never been so regarded under the case law of the Commonwealth. The Grand Jury proceeding is an investigatory proceeding, not a prosecutorial proceeding.

* * *

[72] THE WITNESS [Mr. Pirillo]: As a practical matter, your Honor—and I hope I am answering your question —as a practical matter, if, for example, that group of men who appeared here today, if one of those men were to tell me that he was even slightly interested in immunity, I would probably have informed that client that, if nothing else than his own peace of mind, that he should seek other legal counsel.

THE COURT: You would disassociate yourself from the representation of that witness?

THE WITNESS: I think that would be the best method, your Honor.

* * *

[76] Q. Now, is it your testimony that if a witness that you were representing comes to you and indicates to you that he might consider testifying against other police officers, that you would immediately remove yourself from the case?

A. I think that would be the best method.

Q. So that you feel it's your obligation not to represent that witness but to represent any other witnesses?

A. No. I think it's my obligation that I clear the air of any possible taint that there—that might arise from my representing a police officer who might give testimony as a witness and who could not be, either in the Court's mind or the Special Prosecutor's mind, given a full and adequate defense or legal representation by me.

Q. Are you suggesting, sir, that anytime any police officer felt inclined to cooperate, you would feel inclined to withdraw?

A. I would advise him that the Court, the Special Prosecutor's office, had a special interest in his getting adequate legal representation. I would advise him that there is nothing in my mind that would prevent me from [77] representing him if you decide to take immunity or from representing the police officers if I did not represent

him, but I would strongly advise him if he had any doubts in his mind, to go out and obtain outside counsel. I think, as a practical matter, it might be simpler, rather than to have this question arise again, to just simply back off before I do become privy to information and won't put myself in a position—situation where I could know anything.

Q. Why would you withdraw as to that officer and not as to any other officer?

A. Because, certainly, at that particular moment he needs the most adequate legal representation.

Q. And you feel you would not be able to supply adequate legal representation?

A. I have no doubt that I could do it, Mr. Levy. I want him to be assured that I could do it.

Q. My question still is, Mr. Pirillo, why, when a witness would indicate to you that he wanted to cooperate, you would withdraw from that witness and not the other witness?

A. I thought I answered that.

Q. Does it have anything to do with the fact that you're retained by the Fraternal Order of Police?

A. I'm not retained by the Fraternal Order of Police.

* * *

[80] MR. SHMUKLER: Your Honor, I have not objected, but I sort of think that Mr. Pirillo has been answering these questions in the context — in a different context than perhaps Mr. Levy has been asking questions. I think that Mr. Levy has not made clear that he means to ask him in the context of a witness who Mr. Pirillo represents as giving information against other witnesses he represents.

THE COURT: That is precisely the context within which I have addressed my question.

MR. SHMUKLER: I so understood and I got from the context of your last question and Mr. Pirillo's answer.

What I think he answered to one of the earliest questions I asked, that he knows of no information about one of these witnesses would be adverse to any of the others, and that if he did learn of it, he would immediately disqualify himself, so that the remaining questions that Mr. Levy has been asking and that your Honor just asked, that if in the course of representing A and he is offered immunity, he learns that it's got information about B and C, I don't think that we've reached that point because Mr. Pirillo would have reached that in his initial interview and would have disqualified himself from further representation.

* * *

[92] BY MR. LEVY:

Q. Yes, sir.

A. And thereafter B informs me of what he is going to testify to?

Q. Yes, sir.

A. I think I cannot be in that position. A having told me he will in some way affect B automatically would have to force me to tell B to go out and get other legal representation.

* * *

[94] THE WITNESS: I could only say, your Honor, that once a witness comes out and informs me that he has been asked to give testimony about a witness who will come there after him, that I will have to tell the witness there after him that a conflict has arisen, that I cannot represent him.

* * *

[96] BY MR. LEVY:

Q. Mr. Pirillo, in the past you have represented the Fraternal Order of Police as an organization; is that correct?

A. Yes, I have.

* * *

APPENDIX C

MOTION FOR RECONSIDERATION OF APPLICATION FOR STAY OF MANDATE OF THE PENNSYLVANIA SUPREME COURT BASED ON NEW FACTS

IN THE

SUPREME COURT OF THE UNITED STATES

——— TERM, 1975

No. A-102

ANTHONY D. PIRILLO, JR., ESQUIRE
and
SALVATORE J. CUCINOTTA, ESQUIRE, *et al.*
Petitioners

vs.

HONORABLE HARRY A. TAKIFF, *et al.*
Respondents

Motion for Reconsideration of Application for Stay of Mandate of the Pennsylvania Supreme Court Based on New Facts

To the Honorable William O. Douglas, Justice of the Supreme Court of the United States:

Since August 1, 1975, the date when the original Application for Stay was filed, the following has occurred that clearly indicates that the ATTORNEY PETITIONERS HAVE BEEN DISMISSED FROM REPRESENTING *ALL* POLICEMEN BEFORE THE SPECIAL INVESTIGATING GRAND JURY.

1. On August 4, 1975, the Pennsylvania Supreme Court denied our Petition for Stay.

2. On August 5, 1975, the Honorable Matthew W. Bullock, Jr., Supervising Judge of the Special Investigating Grand Jury, ordered that the attorney-petitioners not represent officer Francis Martino. (See Reconsideration Exhibit "A").

3. On August 8, 1975, your petitioner filed a Petition for Reconsideration (See Reconsideration Exhibit "B")

wherein your petitioner pointed out that the subpoena of Officer Martino was beyond the scope of the Pennsylvania Supreme Court Decision and that no Petition to Dismiss had been filed by the Special Prosecutor, nor was any evidentiary held. (See Reconsideration Exhibit "C", copy of Pennsylvania Supreme Court Slip Opinion of *Pirillo* vs. *Takiff* — Pa. — (1975).

4. On August 9, 1975, the petitioner's Petition for Reconsideration before Judge Bullock was denied and counsel for Officer Martino, Salvatore J. Cucinotta, Esquire, was advised that any continued representation of Officer Martino would result in contempt.

5. On August 8, 1975, your petitioner filed a Motion to Quash Subpoena in behalf of his client, Officer George Marthers, who he had represented before the Grand Jury while the Pennsylvania Supreme Court was considering the case of *Pirillo* vs. *Takiff* — Pa. — (1975).

6. On August 8, 1975, the Petition of my client, George Marthers, was denied and again your petitioner was directed not to represent his client "In any matter pertaining to the Special Investigating Grand Jury." (See Reconsideration Exhibit "D", copy of Order).

7. Again the Special Prosecutor with regard to Officer Marthers never indicated to the Judge any reason for a possible conflict, nor was any hearing held on the question.

WHEREFORE, the petitioners, in the light of these new developments, respectfully urges this Court to issue a Stay in order to allow the final preparation of a Petition for Certiorari.

/s/ SALVATORE J. CUCINOTTA, ESQUIRE

APPENDIX C

PETITION FOR STAY PENDING APPEAL
TO THE UNITED STATES SUPREME COURT

IN THE
COURT OF COMMON PLEAS
PHILADELPHIA COUNTY CRIMINAL DIVISION

ANTHONY D. PIRILLO, JR.,	Pennsylvania Supreme Court No. 184
v.	
HONORABLE HARRY A. TAKIFF	Miscellaneous Docket No. 20
ANTHONY D. PIRILLO, JR., ESQUIRE, *et al.*	Pennsylvania Supreme Court No. 214
v.	
HONORABLE HARRY A. TAKIFF AND WALTER M. PHILLIPS, JR., ESQUIRE	Miscellaneous Docket No. 20

Petition for Stay
Pending Appeal to the
United States Supreme Court

The appellant petitioners, received an opinion of the Pennsylvania Supreme Court entitled *Pirillo* v. *Takiff*, — Pa. —, — A.2d —, Misc. No. 20 (1975, July 7) a copy of which is attached. The case involves the "novel question of whether the supervising judge of a regular grand jury conducting a special investigation may disqualify a single attorney and his associate from representing twelve witnesses subpoenaed to testify before the grand jury". *Ibid.*

The single attorney and his associate referred to above are Anthony D. Pirillo, Jr., Esquire and Salvatore J. Cucinotta, Esquire licensed attorneys in the Commonwealth of Pennsylvania.

The twelve witnesses are: Michael Petta, Alfred C. Pfeiffer, William Deabler, Edward Milewski, Ronald Kluge, John Beal, Carmen Giordano, Harry Quigley, Leroy Ward, James Malaby, Joseph Corvi, and George Elwell, who are present or former police officers who have contributed into a legal defense fund of an organization known as the Fraternal Order of Police.

Before the twelve appellant-police-petitioners testified before the grand jury, the prosecutor gave the supervising judge *secret* information unknown to petitioners that there would be a conflict of interest for one attorney and his associate represent all twelve. After all twelve policemen waived the possibility of a conflict, the attorney-appellants were subsequently dismissed and the case was appealed to the Pennsylvania Supreme Court.

According to the Pennsylvania Supreme Court the two attorney-appellant petitioners may not represent the twelve policemen and the policemen must retain seperate legal counsel who are not to be paid from the legal defense fund of the Fraternal Order of Police.

The effect of the Pennsylvania Supreme Court's decision is to *ALLOW THE GOVERNMENT TO PICK ONE'S DEFENSE ATTORNEY.*

This is one of the reasons the Pennsylvania Supreme Court calls the matter "novel". Never before has the right to counsel of ones own choosing contained any exception.

The twelve policemen are now subpoenaed to appear before the special investigating grand jury on Friday, July 18, 1975. However, the appellant-petitioners wish to seek and exercise their constitutional right of due process appellate review in the United States Supreme Court. To proceed with their oath and testimony before the Special Investigating Grand Jury would in effect deny their appellate due process rights. Furthermore, the appellant-petitioners also wish to exercise their rights under the Civil Rights Act in the United States District Court.

WHEREFORE, the appellants respectfully request a Stay of all proceedings involving each of them before the Special Investigating Grand Jury pending appellate review of their Petition for Writ of Certiorari.

Respectfully submitted,

SALVATORE J. CUCINOTTA, ESQUIRE

APPENDIX C

APPLICATION FOR STAY OF MANDATE OF
THE PENNSYLVANIA SUPREME COURT

IN THE

SUPREME COURT OF THE UNITED STATES

—— TERM, 1975

No. A-102

ANTHONY D. PIRILLO, JR., ESQUIRE,

and

SALVATORE J. CUCINOTTA, ESQUIRE, *et al.*
Petitioners,

vs.

HONORABLE HARRY A. TAKIFF, *et al.*
Respondents.

Application for Stay of Mandate of the Pennsylvania Supreme Court

To the Honorable William Brennan, Justice of the Supreme Court of the United States and Circuit Justice for the Third Circuit:

Petitioners pray that an Order be entered staying the mandate of the Pennsylvania Supreme Court in *Pirillo vs. Takiff*, — Pa. —, — A2d—, (July 7, 1975), which will otherwise be followed on August 6, 1975, pending the filing of a Petition for Certiorari and a final determination of the matter by this Court.

A STAY IS REQUIRED BECAUSE THE PENNSYLVANIA SUPREME COURT HAS RULED THAT WHERE A CRIMINAL DEFENSE ATTORNEY DEFENDS MULTIPLE CLIENTS LAWFULLY AND VIGOROUSLY, THE PROSECUTOR CAN HAVE SAID COUNSEL DISMISSED BECAUSE *THE STATE'S INTEREST IN A STRONG, FREE AND POWERFULL INVESTIGATING GRAND JURY IS MORE IMPORTANT THAN AN INDIVIDUAL'S RIGHT TO COUNSEL OF HIS CHOICE, AN ATTORNEY'S RIGHT TO PRACTICE HIS PROFESSION, AND AN ASSOCIATION'S RIGHT TO ASSEMBLE AND PETITION.*

In support of this application, petitioners respectfully show as follows:

1. The petitioners consist of two licensed Pennsylvania attorneys, Anthony D. Pirillo, Jr., Esquire, and Salvatore J. Cucinotta, Esquire and twelve policemen who have contributed to a legal defense fund of the Fraternal Order of Police, Lodge #5. The twelve policemen are: Michael Petta, Alfred C. Pfeiffer, William Deabler, Edward Milewski, Ronald Kluge, John Beal, Carmen Giordano, Harry Quigley, Leroy Ward, James Malaby, Joseph Corvi and George Elwell.

2. "On January 31, 1974, the Honorable Harry A. Takiff . . . charged the January, 1974, Grand Jury as a special investigating grand jury to investigate . . . corruption in the Philadelphia Police Department." *Pirillo v. Takiff*, at p.2 slip opinion, a copy of which is attached and marked Exhibit "A".

3. "On March 26, 1974, the Attorney General of Pennsylvania established the office of the Special Prosecutor by appointing respondent, Walter M. Phillips, Jr., as Deputy Attorney General to investigate police corruption in Philadelphia." *Ibid.*

4. The validity of this appointment with regard to the investigation of the twelve policemen in this case where there is a duly elected District Attorney in existence has never been specifically addressed by the Pennsylvania Supreme Court.

5. The office of the Special Prosecutor in Pennsylvania is financed solely by Law Enforcement Assistance Agency (LEAA) funds. The validity of this funding has never been specifically treated by the Pennsylvania Supreme Court.

6. "In June and July of 1974, the twelve policemen/petitioners were subpoenaed to appear before the grand jury." *Ibid* at p.2. Each of the twelve were advised by the respondent Honorable Harry A. Takiff, supervising judge of the special investigating grand jury, that they had the

right to be represented before the investigating grand jury by counsel of their own choosing. Each of the twelve witnesses selected petitioner, Anthony D. Pirillo, Jr., Esquire, and by way of his association with petitioner, Salvatore J. Cucinotta, Esquire, as counsel of their choice.

7. Before the twelve policemen testified, the Special Prosecutor, outside the presence of defense counsel and in chambers, told the supervising judge that a possibility existed that a conflict of interest would develop in the representation of all twelve policemen by two attorneys. "Because the Special Prosecutor's office brought to Judge Takiff 's attention the *possibility* of a conflict of interest . . ." the judge ordered an evidentiary hearing on the question. (Emp. Sup.) *Ibid.*

8. At the evidentiary hearing the Special Prosecutor did not make public what was told to the judge causing the judge to believe that a possibility of a conflict might arise. The twelve police officers, however, insisted that counsel of their choice was Anthony D. Pirillo, Jr., Esquire, and his associate, Salvatore J. Cucinotta, Esquire.

9. On September 23, 1974, the supervising judge dismissed the attorney petitioners and directed the twelve policemen to find other attorneys. The judge's decision was appealed to the Pennsylvania Supreme Court.

10. On July 7, 1975, the Pennsylvania Supreme Court rendered an opinion upholding the dismissal of counsel. The attorney petitioners were ordered not to represent one of the twelve policemen.

11. Subsequently, the Special Prosecutor subpoenaed the twelve police-officers *along with other police officers* for July 18, 1975, advising all of them that they could not have Anthony D. Pirillo, Jr., Esquire, or Salvatore J. Cucinotta, Esquire, as their counsel before the grand jury.

12. On July 16, 1975, your petitioners were denied a Petition for Stay Pending Appeal to the United States District Court and an Application for a Continuance before the supervising judge of the investigating grand jury. Petitioners on the same day filed a Petition for Stay Pending

Certiorari from the United States Supreme Court in the Pennsylvania Supreme Court. (See Exhibit "B"). On July 18, 1975, the Special Prosecutor informed your petitioners that the appearances would be delayed until August 6, 1975.

13. The Pennsylvania Supreme Court to date has neither granted nor denied petitioners' request for a stay.

14. Jurisdiction of this Court to review the case on petition for certiorari rests upon 28 U.S.C. §1254(1). Jurisdiction to issue the stay requested is granted by 28 U.S.C. §2101(f).

15. *Reasons for seeking certiorari:*

The Pennsylvania Supreme Court has decided that the public has an interest to a grand jury that is unimpaired in its investigation of criminality. And that this public interest is more important than the individual's right to counsel of his choice, an attorney's right to practice his profession and an association's right of assembly and petition.

The petitioners feel that the import of such a position is one which will meet with at least four members of the United States Supreme Court voting in favor of certiorari because there are at least three important issues at stake.

(a) *The conflict between the decision below and this Court's decision in Gideon vs. Wainwright* 372 U.S. 355, 83 S. Ct. 792, 9 L Ed. 799 (1962). *Gideon* indicated that an accused is guaranteed the right to counsel of his choice. The decision below qualifies that right and indicates that at the grand jury level the accused is guaranteed the right to an attorney who is acceptable to the supervising judge of the grand jury.

(b) The conflict between the decision below and this Court's decision in *Dent vs. West Virginia*, 129 U.S. 114, 9 S.Ct. 231, 32 L. Ed. 623 (1889). In *Dent* this Court held that an attorney has a right to follow their profession and that this right cannot be arbitrarily taken away. The

decision below holds that because the prosecutor arbitrarily decides to advise the judge of the possibility of a conflict the attorney petitioners cannot represent any policemen before the special investigating grand jury. Indeed, the decision below is not even limited to the 12 police petitioners because the special prosecutor is advising other police witnesses that they are forbidden to retain counsel paid for by the Fraternal Order of Police.

One wonders how long the attorney-petitioners are forbidden from representing policemen before the grand jury?

(c) *The conflict between the United States Constitutional First Amendment Right of collective activity to obtain meaningful representation and the decision below.*

The decision of the Court below is completely contrary to: *NAACP vs. Button*, 371, U.S. 415, 835 S. Ct. 328, 9 L.Ed. 2d 405 (1963); *Brotherhood of R. Trainmen vs. Virginia*, 377 U.S. 1, 12 L.Ed. 2d 89, 84 S. Ct. 1113, 11 ALR 3d 1196 (1964); *United Mine Workers vs. Illinois State Bar Association*, 389 U.S. 217 88 S.Ct. 353, 19 L.Ed. 2d (1967); *United Transportation Union vs. Michigan*, 401 U.S. 576, 91 S. Ct. 1076, 28 L.Ed. 339 (1971).

For example, in *Trainmen supra* the Court said:

> *A State could not, by invoking the power to regulate the professional conduct of attorneys, infringe in any way the right of individuals and the public to be fairly represented in lawsuits authorized by Congress to effectuate a basic public interest.* Laymen cannot be expected to know how to protect their rights when dealing with practical and carefully counseled adversaries, c f. *Gideon vs. Wainwright*, 372 U.S. 335, 9 L Ed. 2d 799, 83 S. Ct. 792, 93 ALR 2d 733 and for them to associate together to help one another to preserve and enforce rights granted them under federal laws *cannot be condemned as a threat to legal ethics.* (c.f. Drinker, Legal Ethics (1953), 167; *Hildebrand vs.*

> *State Bar*, 36 Cal 2d 504, 515, 225 P 2d 508, 514 (Carter, J. dissenting), 36 Cal 2d at 521, 225 P 2d, at 518 (Traynor, J. dissenting)." Emp. Sup. 12 L. Ed. 93-94.

16. *The irreparable injury to petitioner.* The twelve policemen are now subpoenaed for August 6, 1975 along with other policemen for the same date. All policemen subpoenaed have been advised by the special prosecutor that they must seek individual counsel not paid by the Legal Fund of the Fraternal Order of Police.

The twelve police petitioners and the two attorney petitioners wish to Petition this Court for Certiorari to test the validity of the decision below.

If the twelve police petitioners are forced to go forward before the grand jury the issues presented in their Petition for Certiorari will be moot and the rights of each of them they wish to exercie before the grand jury will be irrevocably lost.

WHEREFORE, petitioners pray that the judgment and mandate of the Pennsylvania Supreme Court which will otherwise become effective on August 6, 1975, be stayed pending the timely filing of a petition for a writ of certiorari and a final determination of the matter by the Court.

Respectfully submitted,

/s/ SALVATORE J. CUCINOTTA, ESQUIRE

APPENDIX D

ORDER OF DISMISSAL RE OFFICER MARTINO

IN THE
COURT OF COMMON PLEAS OF PHILADELPHIA
CRIMINAL TRIAL DIVISION

IN RE:	JANUARY 1974 SPECIAL INVESTIGATING GRAND JURY	JANUARY TERM, 1974 MISCELLANEOUS DOCKET NO. 74-00-0430
RE:	SUBPOENA NO. 1534 TO FRANCIS MARTINO	

ORDER

AND NOW, this 5th day of August, 1975, the Supreme Court of Pennsylvania on July 31, 1975 having denied a stay with respect to the opinion and order in the cases of *Pirillo, et al. v. Takiff, et al.* (No. 184, Miscellaneous Docket No. 20) and *Pirillo, et al. v. Takiff, et al.* (No. 214, Miscellaneous Docket No. 20), the oral motion of Salvatore J. Cucinotta, Esquire, for a stay of disqualification with respect to representation of Francis Martino with respect to Subpoena No. 1534 herein is denied.

Mr. Martino is directed to appear before this Court for swearing-in on Friday, August 8, 1975 at 9:15 A. M. in Room 604 City Hall, Philadelphia, in propria persona or with counsel other than Anthony D. Pirillo, Esquire, or Salvatore J. Cucinotta, Esquire. Messrs. Pirillo and Cucinotta are directed not to represent Mr. Martino at the said time and place or otherwise in conncection with his appearance and testimony before the Special Investigating Grand Jury.

/s/ BULLOCK, J.

APPENDIX E

ORDER OF DISMISSAL RE CAPTAIN MARTHERS

IN THE

COURT OF COMMON PLEAS OF PHILADELPHIA

CRIMINAL TRIAL DIVISION

IN RE: JANUARY 1974 SPECIAL INVESTIGATING GRAND JURY

JANUARY TERM, 1974
MISCELLANEOUS DOCKET
74-00-0430

RE: SUBPOENAS DUCES TECUM NOS. 1537, 1538, 1539 TO POLICE & FIRE FEDERAL CREDIT UNION, FOUNDERS FEDERAL SAVINGS AND LOAN ASSOCIATION AND FIDELITY BANK DIRECTING THEM TO PRODUCE RECORDS AND DOCUMENTS RELATING TO GEORGE MARTHERS

ORDER

AND NOW, this 8th day of August, 1975, the Petition to Quash Subpoena referring to Subpoenas Nos. 1537, 1538 and 1539 to Police & Fire Federal Credit Union, Founders Federal Savings and Loan Association and Fidelity Bank directing them to produce records and documents relating to George Marthers, filed by Salvatore J. Cucinotta, Esquire, on behalf of George Marthers is denied. Moreover, in light of the decision of the Supreme Court of Pennsylvania dated July 31, 1975 in the cases of *Pirillo, et al. v. Takiff, et al.* (No. 184, Miscellaneous Docket No. 20) and *Pirillo, et al. v. Takiff, et al.* (No. 214, Miscellaneous Docket No. 20), Salvatore J. Cucinotta, Esquire, is directed not to represent George Marthers, an officer of the Police Department of the City of Philadelphia, in any matter pertaining to the Special Investigating Grand Jury. George Marthers is directed not to consult further with said attorney with respect to any such matter.

The parties subpoenaed herein are directed to appear before this Court on Wednesday, August 13, 1975 at 9:15 A. M. in Room 604, City Hall, Philadelphia, for swearing-in.

/s/ BULLOCK, J.

APPENDIX F

STENOGRAPHIC NOTES OF
ORDER OF DISMISSAL RE OFFICER MAIRONE

IN THE
COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

RE: ANTHONY MAIRONE

BEFORE: HONORABLE MATTHEW W. BULLOCK, JR., J.

Monday, August 18, 1975
(9:30 o'clock a.m.)

PRESENT: ANTHONY PIRILLO, JR., ESQUIRE
Suite 600
1420 Walnut Street
Philadelphia, Pennsylvania

SALVATORE J. CUCINOTTA, ESQUIRE
Suite 600
1420 Walnut Street
Philadelphia, Pennsylvania

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[2] THE COURT: What I am about to say applies to both of you gentlemen. I was very surprised to see Mr. Cucinotta here this morning representing a policeman.

In light of the order of the Supreme Court and in light of the discussions that I have had on record with Mr. Cucinotta following the order of the Supreme Court, I wish to make it clear to both of you gentlemen that it is my understanding that the order of the Supreme Court prohibits you from representing police officers before the Special Investigating Grand Jury. Until an appellate court says, henceforth you may represent police officers before the Special Investigating Grand Jury, I shall be obliged to consider any such representation in the form of consulta-

tion, appearance before this Court or appearance before the Special Investigating Grand Jury in contempt of the order of the Supreme Court and this Court. I don't want there to be any misunderstanding on this matter.

MR. PIRILLO: Any police officer on any Grand Jury matter whatsoever before the Special [3] Prosecutor? I want to ask, and certainly we intend to abide by your Honor's rule, I would ask if your Honor could reduce that order to writing so we might include that in a test before the Appellate Court.

THE COURT: Well, I will ask the stenographer to transcribe what I just said.

HEARING CONCLUDED

APPENDIX G

NOTES OF TESTIMONY OF WAIVER OF CONFLICT
BY TRIAL DEFENDANTS

[3] (The following is an excerpt of testimony taken on September 8, 1975 in Courtroom 480.)

MR. McCARTHY: We would like them to be advised of their right to court-appointed counsel, if they can't be appointed counsel.

THE COURT: Very well. Gentlemen, in the event that you perceive that there is a conflict or you want a separate lawyer, this question goes to you individually, if you desire such counsel and you cannot afford counsel, the court will appoint counsel to represent you at no charge to you. Do you understand that, Mr. Frame?

DEFENDANT FRAME: I know that.

THE COURT: Do you understand that?

DEFENDANT HALLMAN: Yes, I do.

MR. McCARTHY: One further point, your Honor. In view of the findings of Judge Takiff made in Pirillo vs. Takiff, we [4] would ask the court to advise the defendants that there is a possibility of a conflict on the part of Mr. Cucinotta or Mr. Pirillo between the interest of these defendants and the interest of the Fraternal Order of the Police. That would probably preclude or at least there is a possibility that neither of these defendants would be advised by their present counsel of their right to explore the possibility of cooperating with the Commonwealth in exchange for favorable treatment, and I would like a waiver of that possible conflict on this record.

MR. CUCINOTTA: If the Court please, I wish to place on the record the fact that the defendants are saying to you at the present time that they perceive no conflict, and that's my understanding of it and that appears to be the Court's understanding also. Now, number two, with respect to the case of Pirillo vs. Takiff. That situation arose from twelve police officers where the Special Prosecutor had an opportunity to advise Judge Takiff as to reasons of a possible conflict in camera without counsel being present. As [5] far as I know, the present time, there has been no in camera session regarding the possibility of a conflict of interest between these two police officers. If there is in fact

such, I would suggest—I'd ask the Court that the Commonwealth be directed to file formal motions because such a procedure would be, if decided adverse to the defendants, directly appealable to the Supreme Court of Pennsylvania.

THE COURT: Does anybody have that case here? I read summaries of that case. I do not have that case before me. Since the matter has arisen, I think that I should look at the case. I hate to delay the proceedings, but if Commonwealth makes a motion before me based on such and such a case, I'm going to have to have such and such a case and look at it.

MR. CUCINOTTA: Your Honor, that case, I have it in my office. I can supply your Honor a copy within half an hour. You'll note in that case that the Court specifically states that this case only applies to twelve police officers saving . . . .

. . .

[8] THE COURT: Very well. Gentlemen, returning to the matter that we had at hand, the colloquy of Mr. Hallman and Mr. Frame. Will they please stand up here [9] again with counsel? Mr. Hallman and Mr. Frame, so that you are fully advised. As you are aware, we interrupted this discussion or what's called the colloquy this morning and we had a conference in the robing room with counsel and we discussed the various aspects of this matter. Counsel also submitted to me the case of Pirillo v. Takiff and I've had the opportunity to read the case and I note that the issue involved in that case involved the representation by Mr. Pirillo of individuals before the Investigating Grand Jury and certain alleged interests of the Commonwealth. I note further that that decision is not grounded on the mere basis of multiple representation or on any impropriety whatsoever of defense counsel. However, in view of that case and the opinion therein, I deem it prudent to make certain further inquiry and, therefore, I'm going to ask certain

further questions. It's been represented to the Court in the robing room that the Fraternal Order of Police is paying for the legal representation of both of you gentlemen, Mr. Hallman and Mr. Frame; is that correct?

[10] DEFENDANT HALLMAN: That's correct.

DEFENDANT FRAME: Yes.

THE COURT: It's further been represented that Mr. Pirillo has and does represent the Fraternal Order of Police in other matters.

MR. CUCINOTTA: If your Honor please, if those are questions directed to my clients, I would respectfully submit that it is not up to them to respond—

THE COURT: I didn't ask a question on that one. They had responded to the first one which they would have had personal knowledge of and the second one is merely a statement of what transpired in the robing room and I want them to be fully informed, and I believe that that is an accurate summary thus far. Do you have any question on that, Mr. Cucinotta, as to the accuracy there of?

MR. CUCINOTTA: As to the accuracy as whether it was represented to the Court that the F.O.P. was paying for counsel, [11] yes, it is a matter of fact that it was represented to you by members of the Special Prosecutor's Office. However—

THE COURT: And, it was also related by Mr. Pirillo. Now, let's move along. If you have a substantial question as to what transpired is one thing. This doesn't effect anything except that I'm leading up to certain questions and I want these gentlemen to be fully informed. Now, if you have an objection—

MR. CUCINOTTA: I would just ask that they would not be asked questions.

THE COURT: All right. I asked them that question, you see. Now, they have responded to it. Then I made the second. Now, I'm going to have to ask them certain questions because I have to decide whether we can proceed to trial. Now, it's also been alleged by the Commonwealth, an allegation that the F.O.P., their attitude in this and similar cases has been one of [12] hostility and non-cooperation with the alleged purposes of the Commonwealth. That's correct, is it not, Mr. McCarthy?

MR. McCARTHY: That's correct, your Honor.

THE COURT: Very well. Now, Mr. Hallman and Mr. Frame, have you heard what I just said?

DEFENDANT HALLMAN: Yes.

THE COURT: Have you understood it?

DEFENDANT HALLMAN: Yes.

THE COURT: Have you, Mr. Frame?

DEFENDANT FRAME: Yes, sir.

THE COURT: Now, knowing what I just said, everything that has transpired here this morning involving these questions that we've been putting to you, the Court advises you that a situation suggested a possible conflict of interest does exist as to the interest of each of you versus the interest of the other. Do you understand that? Frame vs. Hallman and Hallman vs. Frame [13] and, to, the interest of each of you versus any possible conflicting interest of the organization known as the Fraternal Order of Police. Do you understand? So, I want to make clear then that you understand that there is those possible conflicts of interest. Do you understand that? Each of you respond.

DEFENDANT HALLMAN: Yes.

DEFENDANT FRAME: Yes.

THE COURT: Very well. Now, understanding this possibility, does each of you waive the right to demand other counsel?

MR. CUCINOTTA: Your Honor—

THE COURT: Conflict, possibly conflict free counsel?

MR. CUCINOTTA: Your Honor, if I may before the police officers respond. I would respectfully object to that question so far as the possibility of a conflict between the F.O.P. and the individual police officers or the possibility of conflict between Frame and Hallman, both police officers, and between their attorney has been suggested [14] only by the allegations of the Special Prosecutor's Office and as a result, in fact constitutes unproven allegations and since there is no possibility of these allegations being proven at this point, that to in fact ask a waiver of unproven allegations at this point is inadmissible and chilling to at least the individual's right to counsel in itself. Mr. Hallman and Frame. It is also detrimental to the attorney's right to practice his profession and denial of his due process rights in terms of his right to property and practice his profession according to the precepts as mandated in the Constitution and it is otherwise infirmed.

THE COURT: Your objections are noted for the record. They are overruled at this time. Have the last question read back.

(Last question was read back by the court reporter.)

THE COURT: Mr. Frame?

DEFENDANT FRAME: I waive it.

[15] THE COURT: Mr. Hallman?

DEFENDANT HALLMAN: Yes, I do.

THE COURT: Now, does each of you understand that your waiver now at this time applies for the duration of this case?

DEFENDANT HALLMAN: Yes—

MR. CUCINOTTA: Objection.

THE COURT: You'll be heard on the objection. Objection is overruled. You are each advised you will not be heard at a later date to state that you didn't understand or appreciate a possible conflict of interest. That's why I'm taking this time now. Do you understand that?

DEFENDANT HALLMAN: Yes.

DEFENDANT FRAME: Yes.

THE COURT: Do you understand that if a conflict of interest does become apparent during the course of the trial, that you are now waiving the right to delay the trial for the purpose of obtaining other counsel?

MR. CUCINOTTA: Objection.

[16] THE COURT: You wish to be heard on that?

MR. CUCINOTTA: I would indicate to your Honor that it is impossible for these police officers, the defendants in this matter to make a waiver such as you have requested because none of us really know exactly what the evidence would be adduced from the Commonwealth.

THE COURT: Very well. Your objection is noted for the record and what I'm trying to make clear to each of you gentlemen is the importance of what you are doing and I want to be satisfied that what you are doing is your voluntary, knowing and intelligent act. Do you understand?

DEFENDANT FRAME: Yes.

DEFENDANT HALLMAN: Yes.

THE COURT: Now, have any promises been made to you to induce you or to compel you to waive your right to separate individual counsel?

MR. CUCINOTTA: Objection. Your Honor, may I have a moment to think about [17] that question?

THE COURT: Have you understood it, Mr. Frame? Do you want me to repeat it?

DEFENDANT FRAME: Yes, sir.

THE COURT: Mr. Hallman?

DEFENDANT HALLMAN: No, I understand.

THE COURT: All right. Let me go through it again. Have any promises been made to you to induce you to waive or to compel you to waive your right to individual counsel for each of you? Let me put it another way. As I said before, under the Sixth Amendment, everybody is entitled to the representation of counsel. Each of you has the right to say, "I want my own lawyer. I don't want a lawyer representing me and representing somebody else." Do you understand that proposition?

DEFENDANT HALLMAN: Yes.

DEFENDANT FRAME: Yes.

THE COURT: Here you have a situation where you have one attorney [18] representing both of you. Additionally, he has represented the Fraternal Order of Police. You've understood that, right?

DEFENDANT HALLMAN: Yes.

DEFENDANT FRAME: Yes.

THE COURT: Now, considering that, have any promises been made to each of you, to any of you, to compel you or to induce you to give up your right to go out and get your own separate individual lawyer? Do you understand the question?

DEFENDANT FRAME: Nobody promised me anything.

MR. CUCINOTTA: I would object to that question. I would respectfully submit that possible response to that question is protected by the attorney-client privilege and that it is also this whole line of questioning has the basic assumption in it and that is that the defendants are in fact guilty of these crimes. If that is so, I would respectfully submit to your Honor that that is denying the defendants' presumption of innocence.

[19] THE COURT: You are reading something into the questions that I don't because I make no such assumption. Now, Mr. Frame, you've answered the question.

DEFENDANT FRAME: Yes.

THE COURT: No promises have been made to you?

DEFENDANT FRAME: No promises.

THE COURT: Mr. Hallman, have any promises been made to you?

DEFENDANT HALLMAN: No, they haven't.

THE COURT: All right. Now, the converse of another part of that question is this: have any threats been made against you to coerce you into giving up your right to obtain individual counsel?

DEFENDANT FRAME: No, sir.

THE COURT: Is it your knowing and voluntary decision to proceed to trial represented by Mr. Pirillo?

DEFENDANT FRAME: That's right.

[20] DEFENDANT HALLMAN: Yes, it is.

THE COURT: Now, Mr. McCarthy, I am correct, am I not, in assuming that your office has moved solely to have a waiver on the record of any possible conflict of interest; is that correct?

MR. McCARTHY: That's correct, your Honor.

THE COURT: Have I covered everything, gentlemen?

MR. CUCINOTTA: If the Court please, I would object to these proceedings insofar that it is a denial of equal protection since others in the same situation as the defendants are not asked similar questions either here in Philadelphia or as far as my knowledge is concerned, throughout the nation and, further, it is an extension of the fallacy of the interpretation of Pirillo vs. Takiff insofar as Pirillo vs. Takiff may be read to say that you have to go to the Judge and ask him permission in order [21] to represent individuals before a tribunal. That is not my interpretation of the law and respectfully I object to this entire procedure.

THE COURT: Well, very well. Defendants have waived their rights to any other counsel. They have elected freely and voluntarily and intelligently and the Court so finds. So, you will proceed to trial with being represented by Mr. Pirillo and on the basis of Faretta vs. California, recently reported in 17 Criminal Law, 3156, and further in United States vs. Garcia, I believe it's a Fifth Circuit Case reported on August 7, 1975, I find that each of the defendants herein has the right to make such a waiver and the waiver is accepted and noted for the record during the course of these proceedings.

MR. McCARTHY: Thank you, your Honor.

THE COURT: Very well. Can we proceed on the next matter?

APPENDIX H

U.S. v. GARCIA, SLIP OPINION

UNITED STATES OF AMERICA
Plaintiff-Appellee,

v.

RICHARD Y. GARCIA, DOUGLAS W. ALBERT, D. JACKSON, GILBERT GONZALEZ, JESSE C. SMITH, JOHN J. DAVIS, AND DELBERT D. COLLINS,
Defendants-Appellants.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ANTONIO V. ZAVALA AND CARLOS AVILA,
Defendants-Appellants.

NOS. 74-3527, 74-3718

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

AUG. 7, 1975

Appeals from the United States District Court for the Southern District of Texas.

Before GEWIN, DYER and ADAMS,* Circuit Judges.

GEWIN, Circuit Judge:

In these consolidated cases we review a district court's disqualification of three criminal defense attorneys because of apparent conflicts of interest. The central question concerns a criminal defendant's right to retain counsel of his own choice even though the trial court considers such counsel to be disqualified because of a conflict of interest. The distinctive aspect of this case is that the defendants do not seek to waive the right to counsel. Rather they seek to waive the Sixth Amendment guarantees which might otherwise protect them in circumstances adjudged by the district court to disqualify counsel.

The appellants (appellants or defendants) contend that their right to representation by counsel of their own

* Of the Third Circuit, sitting by designation.

choice has been violated by the district court's order preventing their selected attorneys from representing them at trial. They assert that assuming *arguendo* that counsel are burdened with conflicts of interest, their right to representation by counsel of their individual choice is a paramount, continuing, and inviolable right which may not be abrogated by the judgment of the trial court. We are fully conscious of the serious and delicate nature of the issue presented. A resolution of the problem requires a cautious and sensitive consideration and balancing of individual constitutional protections, public policy and public interest in the administration of justice, and basic concepts of fundamental fairness. While we remain wary of the hazards of potential conflicts of interest in this case, we conclude that even should such conflicts exist, the defendants enjoy the right to knowingly and intelligently waive any disqualification noted by the district court. Accordingly, we remand to that court for a determination as to whether the appellants in this case wish to make such a waiver in accordance with the principles herein delineated.

I. Facts

Appellants are members of the Houston Police Department, narcotics division, charged with a variety of federal crimes.[1] Each appellant privately retained counsel to conduct his defense; Zavala and Avila engaged Greene while Garcia, Albert, Collins, Jackson, Gonzalez, Smith, and Davis employed Moore and Hunt. The primary difficulty in this case emanates from those three attorneys' simultaneous representation of other unindicted Houston police-

1. Avila, Zavala, Albert, Jackson, Gonzalez, Smith, Davis, and Garcia were charged with conspiracy against the rights of citizens, deprivation of the rights of citizens, and the filing of income tax returns containing false statements. In separate indictments, Garcia was also charged with perjury before a federal grand jury and filing income tax returns which contained false statements. Zavala, Gonzalez, and Collins were indicted in yet another case for conspiracy to possess and distribute heroin and the possession and distribution of heroin.

men, some of whom are potential witnesses against the appellants. Attorneys Moore and Hunt represent approximately fifteen other such officers, including several whom they represented when they testified before the federal grand jury which indicted Garcia and his co-defendants. Moreover, Moore was asked by the Houston Police Officers Association to be special prosecutor in the case of Zavala and Avila. While he never undertook this task, he apparently had temporary access to official, confidential records concerning the alleged criminal activities of the officers in the Houston Police Department. Greene likewise represents other Houston policemen who have been subpoenaed as witnesses against Avila and Zavala. He also previously represented one Sebastian Mirelez, a convicted felon who is a government witness against Avila and Zavala.

At arraignment in both cases, Judge Seals of the United States District Court for the Southern District of Texas admonished both groups of defendants concerning the hazards of joint representation, and each defendant replied that he wished to retain his present attorney. The government then moved the district court to consider conflicts of interest and possible disqualification of the attorneys. Prior to the commencement of trial, the original indictments, except the two naming only Garcia, were dismissed and new ones were returned. The government thereupon filed a new Motion for Determination of Conflicts of Interest before Judge Hannay.

The government's motion described three circumstances allegedly creating conflicts of interests for these attorneys: (1) representation of co-defendants; (2) Greene's prior representation of Mirelez, now a witness for the government, and (3) multiple and simultaneous representation of defendants and potential prosecution witnesses. Defense counsel and their clients reviewed the government's motion and unanimously determined to oppose it. During the subsequent evidentiary hearing, the government called two witnesses in an effort to establish the attorneys' conflicts of interest, but neither testified conclusively on this

point. Affidavits from other Houston policemen indicate that Moore in fact represents potential adverse witnesses in this case. There was conflicting evidence as to whether the other members of the police department whom Greene represents had given testimony before the federal grand jury which was incriminating to either Zavala or Avila. Greene also argued that his former client Mirelez had not been subpoenaed as a government witness. The attorneys requested that the government identify any "other" adverse witnesses the attorneys represented, but the government declined, asserting privilege under Rule 16, Federal Rules of Criminal Procedure.

At the conclusion of the hearing all of the defendants filed affidavits stating that they had carefully reviewed Judge Hannay's admonitions and had fully discussed the pitfalls of dual representation with their retained counsel and "independent counsel." Zavala's statement was typical:

> I have discussed these facts in detail with Mr. Greene and other attorneys, and I am fully aware that it is my right to employ other counsel if I wish to. I have read the Government's motions concerning a conflict of interest and have discussed this extensively with Mr. Greene. He has represented me continuously since March 23, 1973, and in my opinion he knows more of the facts and has a better command of the situation than any other attorney would have. To deprive me of his representation would deprive me of effective assistance of counsel, a right guaranteed me by the United States Constitution.

Various other members of the Houston Police Department described as "potential witnesses" who are also represented by the attorneys in question filed similar affidavits.

The district court, apparently determining that the Sixth Amendment guarantees of effective assistance of counsel had not been or could not be waived in these circumstances, ordered the nine defendants to retain other counsel and disqualified Greene, Moore and Hunt from fur-

ther participation in this case. The court founded its conclusion on a finding that the defendants "do not as laymen fathom or foresee the professional vice and treachery pregnant in the situation at hand." The authority cited in the Memorandum and Order suggest that the district court concentrated principally on the problem of representation of co-defendants rather than simultaneous representation of defendants and potential adverse witnesses[2]

II. Appealability

[1] The threshold issue in this case is whether the district court's order disqualifying the attorneys in question constitutes an appealable order. Under the principles articulated in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546, 69 S.Ct. 1221, 1225, 93 L.Ed. 1528, 1536, we hold that the disqualification order, although not a "final judgment" in the traditional sense, involves a claim "separable from and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." See also Tomlinson v. Florida Iron and Metal, Inc., 291 F.2d 333 (5th Cir. 1961); Tomlinson v. Poller, 220 F.2d 308 (5th Cir. 1955). *Cf.* American Can Co. v. Citrus Feed Co., 436 F.2d 1125 (5th Cir. 1971); Uniweld Products, Inc. v. Union Carbide Corp., 385 F.2d 992 (5th Cir. 1967). In this case, deferral of review until after completion of the trial would dissipate judicial resources and possibly jeopardize the defendants' case by prohibiting representation at trial by counsel of their choice.

2. Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed 680 (1942); Baker v. Wainwright, 422 F.2d 145 (5th Cir. 1970), and United States v. Liddy, 348 F.Supp. 198 (D.D.C. 1972), three of the cases on which the district court relied, all dealt with conflict of interest situations arising from one attorney's representation of two or more defendants. The fourth case cited in that court's opinion, United States v. Pinc, 452 F.2d 507 (5th Cir. 1971), did involve a situation in which an attorney's simultaneous representation of a defendant and a potential witness may have interfered with the development of a complete defense.

III. Waiver

[2] On appeal, the defendants offer two rationales for reversal. First, they contend, their attorneys' multiple representation does not subject them to conflicts of interest, and second, even if there are conflicts, as determined by the district court, these defendants may waive the right to conflict-free representation. In deciding this case, we need not actually determine whether the multiple representation evident in this case will result in ineffective assistance of counsel. Not only would such a pre-trial ruling on the appellate level be speculative and premature, it is inappropriate in the posture of this case. A finding that the defendants can and did waive their constitutional right to conflict-free representation would obviate the necessity of deciding the merits of their Sixth Amendment issue. While we find that the record presently before us does not permit a determination of whether the defendants actually *did* waive these Sixth Amendment protections, we conclude that they *can* waive such guarantees. We turn now to an examination of the rules governing waiver of constitutional rights, particularly those guaranteed by the Sixth Amendment.

[3-5] Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938), the classic case delineating the standard for measuring an effective waiver of a constitutional right, requires that a waiver must be an "intentional relinquishment or abandonment of a known right." This standard must be applied in all cases in which the underlying claim is a federal constitutional right. Fay v. Noia, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963). The Supreme Court refined the *Johnson* standard in Brady v. United States, 397 U.S. 742, 748, 90 S.Ct. 1463, 1469, 25 L.Ed.2d 747, 756 (1970) by requiring that valid waivers not only be voluntary but also be "knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." See also Brookhart v. Janis, 384 U.S. 1, 86 S.Ct. 1245, 16 L.Ed.2d 314; Adams v. United States ex rel. McCann, 317 U.S. 269, 63 S.Ct. 236, 87 L.Ed. 268;

Patton v. United States, 281, U.S. 276, 50 S.Ct. 253, 74 L.Ed. 854; United States v. Shea, 508 F.2d 82 (5th Cir. 1975). The cases draw no distinction between waiver of the right to remain silent during interrogation, the right to confer with counsel, the right to representation by competent counsel at trial, the right to contest accusations of criminality through a plea of not guilty, the right to a jury trial, and the right to be present at trial. To do so would be to discriminate against one right in favor of another when the Constitution does not so require. While it is undisputed that federal courts must strictly enforce the Sixth Amendment right to effective assistance of counsel, neither the Supreme Court nor this circuit has intimated that this constitutional guarantee is of a "preferred" nature, deserving of any type of heightened judicial scrutiny. Thus, even though the right to competent counsel is "fundamental," Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972); Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942); Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932), it may nonetheless be waived.

[6-9] The Bill of Rights is a catalogue of limitations on government, ensuring that certain inalienable rights are not to be infringed by the sovereign. But the prohibitions of the first ten constitutional amendments, while designed for the protection of individuals, were not intended as mandatory proscriptions on them.[3] Individuals are

3. In recognizing the right of a criminal defendant to conduct his own defense, the Supreme Court in Faretta v. California, — U.S. —, 95 S.Ct. 2525, 3531, 44 L.Ed.2d — (1975), quoted with approval the following language from Adams ex rel. McCann v. United States, *supra:*

> What were contrived as protections for the accused should not be turned into fetters . . . To deny an accused a choice of procedure in circumstances in which he, though a layman, is as capable as any lawyer of making an intelligent choice, is to impair the worth of great Constitutional safeguards by treating them as empty verbalisms.

free to waive the constitutional protections otherwise afforded them, regardless of their motivation, so long as the waiver is voluntary, knowing and intelligent. To be sure, federal courts should refrain from casually finding waiver of vital federal constitutional guarantees, such as the right to counsel, *Cf.* Moore v. Michigan, 355 U.S. 155, 78 S.Ct. 191, 2 L.Ed.2d 167; Johnson v. Zerbst, *supra*, but the government's suggestion on appeal that it is impossible as a matter of law to waive the Sixth Amendment right to effective assistance of counsel in cirumstances involving serious conflicts of interest is novel and unfounded. If defendants may dispense with the right to be represented by counsel altogether, Faretta v. California, — U.S. —, 95 S.Ct. 2525, 44 L.Ed.2d — (1975); McKenna v. Ellis, 263 F.2d 35 (5th Cir. 1959),[4] it would seem that they may waive the right to have their retained counsel free from conflicts of interest.

> . . . When the administration of the criminal law . . . is hedged about as it is by the Constitutional safeguards for the protection of an accused, to deny him in the exercise of his free choice the right to dispense with some of these safeguards . . . is to imprison a man in his privileges and call it the Constitution.

Faretta further observes that the seminal cases establishing the Sixth Amendment right to counsel, Powell v. Alabama, *supra;* Johnson v. Zerbst, *supra;* Gideon v. Wainwright, *supra;* Argersinger v. Hamlin, *supra,* must not be construed as interfering with the right to representation by counsel of one's choice:

> [I]t is one thing to hold that every defendant, rich or poor, has the right to the assistance of counsel, and quite another to say that a State may compel a defendant to accept a lawyer he does not want. The value of state-appointed counsel was not unappreciated by the Founders, yet the notion of compulsory counsel was utterly foreign to them. And whatever else may be said of those who wrote the Bill of Rights, surely there can be no doubt that they understood the inestimable worth of free choice [footnotes omitted].

— U.S. at —, 95 S.Ct. at 2540, 44 L.Ed.2d at — (1975).

4. In reaching this conclusion, we are cognizant of a line of cases indicating that the right to dispense with counsel at trial is not absolute but may be denied in appropriate circumstances. E. g., Manson v. Pitchess, 317 F.Supp. 816 (C.D.Calif. 1970); Seale v. Hoffman, 306 F.Supp. 330 (N.D.Ill. 1969); United States v. Davis,

[10] Our conclusion that defendants may waive the right to conflict-free assistance of counsel abrogates the need on this pre-trial appeal to evaluate the actual or potential ineffectiveness of counsel occasioned by alleged conflicts of interest. Rather we remand to the district court to determine whether the defendants competently and intentionally waive their Sixth Amendment protections. It is appropriate that the district court make this determination since voluntariness must depend on the particular facts and circumstances of each case.[5]

[11] Because of the unchallenged importance of the need for adequate representation during criminal proceedings, we direct the district court to scrupulously evaluate the insistence of the defendants on the right to privately retained counsel of their choice even though the district court may discern a conflict of interest in such representation. In addition, that court must also carefully evaluate the persistent efforts of the defendants to waive any imperfections in such representation which may be apparent to the court. The trial court should actively participate in the waiver decision. The Supreme Court recognized the

Note 4—*Continued*

260 F.Supp. 1009 (E.D.Tenn. 1966). While we offer no judgment as to the cogency of these decisions, we find their rationales inapplicable to the facts of this case. Moreover, the recent decision in Faretta v. California, *supra*, seems to seriously erode the holdings of these cases. In the instant litigation, the defendants are seeking not to proceed pro se but rather to retain the same counsel who represented them in state criminal and federal grand jury proceedings. Furthermore, there is no clear indication that a knowing and intelligent waiver of the right to effective counsel in these circumstances would adversely affect the defendants', the prosecutor's or the public's interest in a fair trial.

5. The determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.

Johnson v. Zerbst, 304 U.S. at 464, 58 S.Ct. at 1023, 82 L.Ed. at 1466.

need for affirmative judicial involvement in the waiver process in Von Moltke v. Gillies, 332 U.S. 708, 723-24, 168 S.Ct. 316, 323, 92 L.Ed. 309, 320-21 (1948):

> [A] judge must investigate as long and as thoroughly as the circumstances of the case before him demand. The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered.

See also Tribe, Foreward: Waiver of Constitutional Rights: Disquiet in the Citadel, 84 Harv.L.Rev. 1, 23-24 (1970).

[12, 13] In accordance with the foregoing principles, we instruct the district court to follow a procedure akin to that promulgated in F.R. Crim. P. 11 whereby the defendant's voluntariness and knowledge of the consequences of a guilty plea will be manifest on the face of the record. *Cf.* Boykin v. Alabama, 395 U.S. 238, 244, 89 S.Ct. 1709, 23 L.Ed. 2d 274, 280 (1969); McCarthy v. United States, 394 U.S. 459, 466, 89 S.Ct. 1166, 22 L.Ed. 2d 418, 425 (1969); United States v. Vera, 514 F.2d 102, 104 (5th Cir. 1975); United States v. Davis, 493 F.2d 502 (5th Cir. 1974). As in Rule 11 procedures, the district court should address each defendant personally and forthrightly advise him of the potential dangers of representation by counsel with a conflict of interest. The defendant must be at liberty to question the district court as to the nature and consequences of his legal representation. Most significantly, the

court should seek to elicit a narrative response from each defendant that he has been advised of his right to effective representation, that he understands the details of his attorney's possible conflict of interest and the potential perils of such a conflict, that he has discussed the matter with his attorney or if he wishes with outside counsel, and that he voluntarily waives his Sixth Amendment protections. *Cf.* United States v. Foster, 469 F.2d 1 (1st Cir. 1972). It is, of course, vital that the waiver be established by "clear, unequivocal, and unambiguous language." National Equipment Rental v. Szukhert, 375 U.S. 311, 84 S.Ct. 411, 11 L.Ed. 2d 354, 367-8 (1964). Mere assent in response to a series of questions from the bench may in some circumstances constitute an adequate waiver, but the court should nonetheless endeavor to have each defendant personally articulate in detail his intent to forego this significant constitutional protection. Recordation of the waiver colloquy between defendant and judge will also serve the government's interest by assisting in shielding any potential conviction from collateral attack, either on Sixth Amendment grounds or on a Fifth or Fourteenth Amendment "fundamental fairness" basis.

The conclusion reached in this case in no sense minimizes the constitutional guarantee of the effective and competent assistance of counsel in criminal prosecutions. We hold only that if, as a matter of fact, a defendant after thorough consultation with the trial judge knowingly, intelligently and voluntarily wishes to waive this protection, the Constitution does not prevent him from so doing.

Reversed and remanded with directions.